

SEMINARIO GIURIDICO
DELLA UNIVERSITÀ DI BOLOGNA

Miscellanea 21

INTERNATIONAL TRADE LAW
ON THE 50TH ANNIVERSARY
OF THE MULTILATERAL TRADE SYSTEM

edited by
PAOLO MENGOZZI



MILANO - DOTT. A. GIUFFRÈ EDITORE - 1999

1. *Contributi al realismo giuridico*, I, a cura di Enrico Pattaro, 8°, pag. VIII-296.
2. A. M. CALAMIA - P. MENGOZZI - N. RONZITTI, *I rapporti di vicinato tra Italia e Jugoslavia*, 8°, pag. IV-528.
3. LEGAL PHILOSOPHICAL LIBRARY. *An International Bibliography of Philosophy and Theory of Law*. Edited by Carla Faralli and Enrico Pattaro. Norberto Bobbio, A Bibliography by Carlo Violi. 8°, pag. IV-224.
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5. LEGAL PHILOSOPHICAL LIBRARY. *An International Bibliography of Philosophy and Theory of Law*. Edited by Carla Faralli and Enrico Pattaro. Poland, A Bibliography by Jerzy Wróblewski. 8°, pag. XII-512.
- 6.¹ LEGAL PHILOSOPHICAL LIBRARY. *An International Series on Philosophy and Theory of Law*. Edited by Carla Faralli and Enrico Pattaro. *Reason in Law*. Proceedings of the Conference Held in Bologna, 12-15 December 1984. Volume One, 8°, pag. VIII-384.
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- 9.¹ ALMA MATER STUDIORUM SÆCULARIA NONA INTERNATIONAL ASSOCIATION OF PROCEDURAL LAW. *Judicial protection of human rights at the national and international level*. International congress on procedural law for the ninth centenary of the university of Bologna (September 22-24, 1988) - Vol. I. GENERAL REPORTS. Edited by Federico Carpi - Chiara Giovannucci Orlandi, 8°, pag. XIV-518.
- 9.² ALMA MATER STUDIORUM SÆCULARIA NONA INTERNATIONAL ASSOCIATION OF PROCEDURAL LAW. *Judicial protection of human rights at the national and international level*. International congress on procedural law for the ninth centenary of the university of Bologna (September 22-24, 1988) - Vol. II. PAPERS AND DISCUSSION. Edited by Federico Carpi - Chiara Giovannucci Orlandi, 8°, pag. X-519-1060.
10. ALMA MATER STUDIORUM SÆCULARIA NONA INTERNATIONAL SOCIOLOGICAL ASSOCIATION RESEARCH COMMITTEE ON SOCIOLOGY OF LAW. *Laws and rights*. Proceedings of the international congress of sociology of law for the ninth centenary of the university of Bologna (May 30 - June 3, 1988) - PANELS AND SESSIONS. Edited by Vincenzo Ferrari, 8°, pag. XIV-1138.
11. ADAM PODGÓRECKI, *A sociological theory of law*. 8°, pag. XVIII-274.

To Asek

with great esteem and friendship

Paulo

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ISBN 88-14-07399-6

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Tipografia «MORI & C. S.p.A.» - 21100 VARESE - Via F. Guicciardini 66

TABLE OF CONTENTS

<i>Preface</i> , by PAOLO MENGGOZZI.	vii
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I. THE INTERNATIONAL TRADE SYSTEM AFTER MARRAKECH

PAOLO MENGGOZZI, <i>The World Trade Organization Law: An Analysis of Its First Practice</i>	3
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II. THE SETTLEMENT OF DISPUTES IN THE WTO SYSTEM

JAVIER FERNÁNDEZ PONS, <i>Self-Help and the World Trade Organization</i>	55
THOMAS SKOUTERIS, <i>Customary Rules of Interpretation of Public International Law and Interpretative Practices in the WTO Dispute Settlement System</i>	113
GABRIELLA VENTURINI, <i>Comments</i>	145
ELISA BARONCINI, <i>The WTO Dispute Settlement Understanding as a promoter of transparent, rule-oriented, mutually agreed solutions - A study on the value of DSU consultations and their positive conclusion</i>	153
RAMBOD BEHBOODI, <i>Legal Reasoning and the International Law of Trade: the First Steps of the Appellate Body of the WTO</i>	303
MASSIMO PANEBIANCO, <i>Comments</i>	368

III. THE LIMITS OF THE WTO SYSTEM

MICHELE VELLANO, <i>Full Employment and Fair Labour Standards in the Framework of the WTO</i>	379
LUCIA SERENA ROSSI, <i>Comments</i>	420

IV. THE IMPACT ON INDIVIDUAL RIGHTS

CARLOS D. ESPÓSITO, <i>International Trade and National Legal Orders: The Problem of Direct Applicability of WTO Law</i>	429
--	-----

MARIE WYNTER, <i>The Agreement on Sanitary and Phytosanitary Measures in the Light of the WTO Decisions on EC Measures concerning Meat and Meat Products (Hormones)</i>	471
MARC MARESCEAU, <i>Comments</i>	527
TALIA EINHORN, <i>The Impact of the WTO agreement on TRIPs (Trade-Related Aspects of Intellectual Property Rights) on EC Law: A Challenge to Regionalism</i>	535

V. STATE DUTIES AND PRIVATE BARRIERS TO INTERNATIONAL TRADE

JOANNA GOMULA, <i>The Standard of Review of Art. 17.6 of the Anti-Dumping Agreement and the Problem of Its Extension to other WTO Agreements</i>	577
MARIA CHIARA MALAGUTI, <i>Restrictive Business Practices in International Trade and the Role of the World Trade Organization</i>	609
ANDREU OLESTI RAYO, <i>Comments</i>	663

VI. NULLIFICATION AND IMPAIRMENT OF WTO BENEFITS

BRETT G. WILLIAMS, <i>Non-Violation Complaints in the WTO System</i>	675
ANDREA COMBA, <i>Comments</i>	798

VII. DISCUSSION

COSIMO RISI, <i>Some Reflections on the Participation of the EC in the WTO</i> .	805
PIETRO MANZINI, <i>Environmental Exceptions of Art. XX GATT 1994 Revisited in the Light of the Rules of Interpretation of General International Law</i>	811
ANTONIO PARENTI, <i>Looking Forward: The European Union's Quest for the Millenium Round</i>	849
<i>Selected Bibliography on the World Trade Organization</i> , by HUGO VAN HAMEL, Peace Palace Library, The Hague	859
<i>List of Contributors</i>	1061

PREFACE

The Centre for Studies and Research of the Hague Academy of International Law, with the renowned timely attention to new themes in international law that distinguishes it, has chosen "The World Trade Organization" as the theme of its 1997 Session.

Before my appointment as Judge at the Court of First Instance of the European Communities in March of 1998, I had the honor of being nominated Director of Studies of the English Speaking Section. Together with the Secretary General of the Hague Academy, Professor Daniel Bardonnet, and with Professor Patrick Juillard, I proceeded to select a highly qualified group of researchers who, from all over the world, had applied to participate in that Session.

After due consultation and with the use of a general bibliography furnished to them, the selected candidates immediately began working at their home universities on a variety of topics which were to become the contributions collected in this volume. Then, from August 18, 1997 to September 12, 1997, these scholars participated in a work which entailed a first presentation of each one's individual research, followed by a collective analysis by the entire group of the first years of activity of the WTO, with particular focus on the panel and Appellate Body reports, and, finally, a critical assessment by the same group of the use of that analysis made by each participant in the elaboration of his or her final essay.

This very intensive project was aided not only by the scientific quality of each of the participants and the extraordinary research endowment of the Peace Palace Library of the Hague, but also by the lively exchange of comments and suggestions which took place during the collective working sessions. The result of that work is this collection of essays which, even beyond their titles, broadly cover the institutional and substantial aspects of the new international

trade law system that arose from the Uruguay Round and the Marrakech Conference.

Because of the particular methods used and the high quality of the content, it is fitting not only that these essays be published, but that they be published together in a single volume. The opportunity of publishing them in this volume is further increased by the fact that the Peace Palace Library has agreed to include in this volume the selected bibliography on the subject of WTO law which was originally prepared for the 1997 Research Centre Session by Hugo van Hamel and updated on July 1, 1998 especially for this publication.

I particularly wish to express my gratitude to the Law School of the University of Bologna, and its *Istituto Giuridico* "Antonio Cicu" together with its Director, Prof. Giorgio Ghezzi, for having accepted my proposal to hold on May 18, 1998 — the 50th anniversary of the multilateral trade system — a conference to which commentators were invited to assess and analyze the work of these researchers, and subsequently publish the relevant proceedings.

My gratitude is extended to the International Association of Jurists Italia — USA and to the Centro Interdipartimentale Ricerche sul Diritto delle Comunità europee (especially to Elisa Baroncini), which undertook a large part of the burden of organizing the conference, as well as to Jennifer Morrissey for the linguistic revision of the contributions appearing in this volume.

Thanks also to the Bologna Center of the Johns Hopkins University, the institution where I started teaching the fascinating subject of international trade law.

Finally, I hope that the publication of this volume by the University of Bologna represents a concrete manifestation of the European academic world's attention to and appreciation for the activities of the Hague Academy on its 75th anniversary.

PAOLO MENGOTZI

I.

THE INTERNATIONAL TRADE
SYSTEM AFTER MARRAKECH

PAOLO MENGOZZI

THE WORLD TRADE ORGANIZATION LAW: AN ANALYSIS OF ITS FIRST PRACTICE (*)

SUMMARY: 1. The distinctive features of the WTO System and the value of analysing them in the light of its first years of operation. — 2. The transition from the GATT 1947 “à la carte system” to the “integrated system” of WTO law. — 3. The dispute settlement system provided of by the DSU: its evolution by reference to that of GATT 1947. — 4. The link between “meaningful consultations” and the operation of the WTO panels and Appellate Body. — 5. Action taken by the Appellate Body to promote predictability and confidence. — 6. The relationship between WTO law and the international law system. — 7. The problem of the exhaustion of local remedies. — 8. The concrete application in WTO law of principles other than those expressed in the Vienna Convention on the Law of Treaties. — 9. The general exceptions to the working of the WTO liberalization principles. — 10. The problem of damages. — 11. The prohibition of nullification and impairment of benefits and non-violation complaints. — 12. WTO and EC Law. — 13. The standard of review to evaluate the consistency with WTO law of measures enacted by the Members. — 14. External elements favouring the implementation of WTO rules. — 15. The new EC Trade Barriers Regulation (TBR) and private economic actors’ access to the DSU remedies. — 16. The potential direct applicability of the WTO rules: the stand taken by the EC Commission. — 17. The *Kupferberg* case. — 18. The principle of reciprocity. — 19. Conditions for the direct applicability of an agreement: content of the provisions themselves and of the national system in which the agreement is to be implemented. — 20. DSU provisions for the surveillance of implementation. — 21. Conclusions.

(*) This analysis has been brought about by the function that the Author has fulfilled as Director of studies of the English speaking section of the 1997 Session of Hague Academy of International Law Centre for Studies and Research in International law and International Relations. It reflects the method by which the pertinent work has been drawn up as well as the results reached with the contribution of all the participants.

1. *The distinctive features of the WTO System and the value of analysing them in the light of its first years of operation.*

The study of the law of the World Trade Organization necessarily carries precise implications. This study entails, among other things, an analysis of the following elements:

- a) the WTO system constitutes an "integrated system";
- b) the system provides a Dispute Settlement Body (DSB) endowed with the power to adopt the Panel and Appellate Body reports on the basis of a negative consensus procedure;
- c) the relationship between international trade rules and international law can be seen in new terms;
- d) the working of the DSB can make more meaningful the prohibition of nullification and impairment of benefits and encourage the lodging of "non-violation complaints";
- e) WTO law covers matters regulated by European Community rules raising problems of relationship with those rules;
- f) special rules are established regarding the standard of review of the Contracting Parties behaviour in specific fields;
- g) a series of elements acts for the implementation of the system beyond the working of the DSU.

The analysis of each of these elements entails a consideration of the general institutional and legal themes of the Marrakech Agreements. However, more than three years after the creation and active operation of the WTO, the task cannot be completed through study of the texts alone. Careful consideration of the practices of the new organization and, in particular, of the reports issued by the Panels and the Appellate Body since the institution of the Dispute Settlement Body (DSB) is also necessary. An effort must be made to grasp the effect the new agreements are having on the above problems in light of such practices.

2. *The transition from the GATT 1947 "à la carte system" to the "integrated system" of WTO law.*

The text of the Agreement Establishing the World Trade Organization unequivocally replaces the GATT 1947 'à la carte' system.

From 1947 to 1994, the GATT system developed out of a series of agreements each providing for specific measures for the resolution of eventual conflict. Such provisions could be invoked only within the framework of the agreement in which they were proscribed. The text of the Marrakech agreements supersedes this situation by setting up a system which is 'integrated' in that:

a) the second paragraph of Article II of the Agreement Establishing the World Trade Organization (hereinafter WTO Agreement) provides that, in order to become a member of the WTO, a State must ratify, along with the agreement establishing the organization, the following agreements and associated instruments (referred to as the multilateral trade agreements): the General Agreement on Tariffs and Trade 1994 and the multilateral agreements on trade in goods, the General Agreement on Trade in Services and its annexes (GATS), the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), the Understanding and Procedures Governing the Settlement of Disputes (DSU), and the Trade Policy Review Mechanism (all referred to as the 'multilateral trade agreements');

b) Article I of the DSU establishes that the rules and procedures provided within it are applicable to disputes arising not only from the GATT itself, but also the GATS and TRIPS agreements;

c) Article 22(3) of the DSU provides that cross-retaliation is included among the measures which the DSB has at its disposition to bring a situation of nullification and impairment of benefits into conformity with the multilateral agreements. This means that when it is deemed "that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector or other sectors under the same agreement," the complaining party may be allowed to suspend concessions or other obligations deriving from another of the multilateral agreements referred to above.

All of this was synthesized by the Appellate Body in the *Brazil - Measures Affecting Desiccated Coconut* case ⁽¹⁾, where it stated:

"The WTO is fundamentally different from the GATT system

(1) *Brazil - Measures Affecting Desiccated Coconut*, Report of the Appellate Body of 21 February 1997, WT/DS22/AB/R.

which preceded it. The previous system was made up of several agreements, understandings and legal instruments. Each of these major agreements was a treaty with different membership, an independent body and a separate dispute settlement mechanism ... Unlike the previous GATT system, the WTO Agreement is a single treaty instrument which was accepted by the WTO Members as a "single undertaking." ... The single undertaking is ... reflected in the provisions of the WTO Agreement dealing with original membership, accession, non-application of the Multilateral Trade Agreements between particular Members, acceptance of the WTO Agreement, and withdrawal from it. Within this framework, all WTO Members are bound by all the rights and obligations in the WTO Agreement and its Annexes 1, 2 and 3" ⁽²⁾.

3. *The dispute settlement system provided for by the DSU: its evolution by reference to that of GATT 1947.*

The integrated character of the WTO, and particularly the mechanism for dispute resolution resulting from the indicated provisions, lends weight and balance to the whole system and is especially innovative compared to what had evolved under the previous regime.

The evolution of dispute settlement under GATT 1947 began with the decision to establish a procedure to bring on the good offices of the GATT's Director General for the settlement of disputes between developed and less developed Contracting Parties. This decision and the practices that followed were qualified by the Contracting Parties in the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance of November 28, 1979 ⁽³⁾ as having led to a customary practice which was to be continued in the future along with the improvements enshrined in this 1979 Understanding. Customary practice consisted, *inter alia*, in a) the employment of panels composed of persons serving in their

(2) WT/DS22/AB/R, cit., p. 11.

(3) *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, adopted on 28 November 1979, L/4907, in *BISD* 26S/210.

individual capacity selected from permanent delegations to GATT of States not party to the dispute, instead of the working groups provided for in Article XXIII of the GATT, b) proposal by the GATT Secretariat of the names of panel members to parties, and c) adoption by the contracting Parties of the panel reports by positive consensus subject, *inter alia*, to the fact that the losing party would not oppose it.

These customary practices and improvements were further enriched by the decision of April 12, 1989 ⁽⁴⁾, whereby the GATT Contracting Parties agreed to establish a fixed time-table for the consultation procedure provided for by Article XXIII of the GATT. If, within 60 days from the request, the consultations failed, the complaining party might ask for the establishment of a panel or of a working party. Further, the Contracting Parties agreed that:

a) unless the parties to a dispute agree otherwise, within 20 days from the establishment of the panel, panels shall have standard terms of reference according to a formula worked out in the same decision;

b) (most importantly) if within 20 days of the request for the establishment of a panel no agreement has been reached on its members, either party may ask the Director General, in consultation with the Chairman of the Council (and after consulting both parties), to form the panel by appointing the panelists whom he considers most appropriate; and

c) the practice of adopting panel reports had to be deemed as confirmed, but the contracting parties having objections had to provide written reasons for their objections for circulation at least ten days prior to the Council meeting at which the panel report would have been considered.

The rule enshrined in Article 16 of the DSU, according to which the panel report will be deemed adopted by the General Council acting as the Dispute Settlement Body (DSB), constitutes a further development of the 1989 Improvements, one that is radically and qualitatively different. With the DSU, the effects of the panel report

(4) *Improvements to the GATT Dispute Settlement Rules and Procedures*, Decision of 12 April 1989, L/6489, in *BISD* 36S/61.

are removed from the losing party's goodwill and acquire an importance of their own. They may only be suspended by a losing party's appeal or rejected by a negative consensus of the DSB, that is by a decision of the latter not to adopt the panel report. Such a decision may be reached only if "no Member, present at the meeting when the decision is made, formally objects." In absence of a party's appeal and of a DSB negative consensus, the report is deemed adopted.

An appeal to a panel report may be based only "on issues of law covered in the panel report or on a legal interpretation developed by the panel" ⁽⁵⁾. Once the Appellate Body has concluded its review, its report must be developed by the DSB and must be "unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within thirty days following its circulation to the Members" ⁽⁶⁾.

4. *The link between "meaningful consultations" and the operation of the WTO panels and Appellate Body.*

The procedural rules referred to above, though they certainly have come to constitute the most significant contribution to the creation of an integrated system, are not the only new elements to the dispute resolution mechanism. Less apparent but no less significant are the provisions which commit the WTO members to seek mutually agreed solutions. The adjudication phase entrusted to WTO Panels and to the Appellate Body is the second step. Recourse to it may be made only after failure in direct consultations undertaken according to precise terms and time limits ⁽⁷⁾.

A closer look at the methods used and the kinds of conclusions reached based upon the rules of the DSU reveals that very often the parties engage in consultations for periods longer than those formally

(5) Art. 17(6) DSU.

(6) Art. 17(14) DSU.

(7) On the diplomatic stage of the DSU, see BARONCINI, E., *"The WTO Dispute Settlement Understanding as a promoter of transparent, rule-oriented, mutually agreed solutions - A study on the value of DSU consultations and their positive conclusion"*, Hague Academy of International Law, Research Centre 1997, English Speaking Section, *infra*, pp. 153 ff.

required. Furthermore, the cases where a friendly settlement was possible are more numerous than those where conclusion was brought about by a decision of the DSB. The reason for this lies in the detailed guidelines set forth in the DSU to be followed when requesting consultations, as well as the obligation therein prescribed to proceed with consultations according to the principle of good faith.

This first phase fulfills several important purposes. First, the careful and detailed application of these rules facilitates the clarification of the terms of the dispute and the positions of the disputants. Each is placed in optimal condition to evaluate whether an appropriate mutually agreed solution may be sought or whether the task of settling the dispute must be left to a Panel and eventually to the Appellate Body.

The obligation to undertake meaningful consultations so as to reach a mutually agreed solution is an important counter-balance to the WTO members lack of a right to veto the establishment of a panel and the adoption of its report. It is only pursuant to adequate consultations for the required period of time provided for by Articles 3 and 4 of the DSU, that a party to the dispute has the right to unilaterally initiate the judicial phase of the DSU. Such a prerequisite is analogous to that established by the International Court of Justice requiring the "previous failure of negotiations" as a necessary condition for recourse to its jurisdiction ⁽⁸⁾.

It is in a member's interest to undertake this first phase seriously, as this diplomatic phase directly determines what may be submitted for assessment before a Panel. This fact has notably motivated cooperation outside the WTO system. While recourse to the panels leads to an interpretation of WTO rules by the panels, through adequate DSU consultations the members maintain control over the issue. Furthermore, meaningful consultations have been incentivated by the fact that the WTO panels and Appellate Body do

(8) BARONCINI, E., *"The WTO Dispute Settlement Understanding as a promoter of transparent, rule-oriented, mutually agreed solutions - A study on the value of DSU consultations and their positive conclusion"*, cit., para. 5 b) and c), *infra*, pp. 190-207.

not view themselves competent to consider issues that were not raised during consultations.

The fact that an adjudication phase may be initiated only in case of failure of the first phase, creates a so-called rule-oriented diplomacy. The negotiators' awareness that the matter will be decided by a third independent entity if an amicable settlement is not achieved changes the diplomats' negotiating technique: the focus is on "their respective predictions as to the outcome of the [independent entity's decision] ... and not ... [on the] potential retaliation or actions exercising power of one or more parties to the dispute" ⁽⁹⁾.

5. *Action taken by the Appellate Body to promote predictability and confidence.*

The new elements flowing from the provisions discussed above — and particularly those arising from interaction between the provisions relating to the obligation to seek a mutually agreed solution and those providing for unilateral recourse to third-party bodies as well, and from the possibility for third parties to be heard in matters which concern them — have had a significant effect on the system. This effect, however, is somewhat weakened by Article XV of the WTO Agreement and by a decision taken by the United States Congress during the debates over US participation in the WTO.

Article XV of the WTO Agreement provides: "Any member may withdraw from this agreement. Such withdrawal shall apply to this agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director General of the WTO". The United States Congress, for its part, has established a review body charged with the task of monitoring the DSB's work. It has committed the Executive to exercise the withdrawal power provided for by Article XV of the WTO Agreement if this review body identifies repeated decisions against the interests of the United

(9) JACKSON, J.H., *The World Trading System - Law and Policy of International Economic Relations*, The MIT Press, Cambridge, Mass., 1989, p. 86.

States. The Appellate Body has reacted to this potential instability by devising a strategy aimed at winning the faith of the Contracting Parties and convincing them of its trustworthiness as it carries out its function of directing the settlement of disputes.

a) The Appellate Body has stressed the fact that Article 3(2) of the DSU attributes to it the task of clarifying the covered agreements in accordance with customary rules of interpretation of public international law and, over time, it has come to identify the latter with those provided for in the Vienna Convention on the Law of Treaties.

b) The Appellate Body has adopted the language and method of the Vienna Convention as its own thus creating "a uniform language, vocabulary, style, fashion and structure of presentation and argumentation"; in addition, it "has ensured a measure of predictability" and given "confidence to the participants in the process that the legal order they have created functions and serves their interests well" ⁽¹⁰⁾. Furthermore, it has specified that "WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world" and noted that "they will serve the multilateral trading system if they are interpreted with that in mind" ⁽¹¹⁾.

c) The Appellate Body has linked its method of judgment to a reasonable system of administration of the burden of proof, a technique previously relied upon by the GATT 1947 panels, and has sought to apply this system with continuity and coherence.

d) The Appellate Body has very distinctly clarified the interpretation of Article XVI of the WTO Agreement which provides that "the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of the GATT

(10) SKOUTERIS, T., *"Customary Rules of Interpretation of Public International Law and Interpretative Practices in the Wto Dispute Settlement System"*, Hague Academy of International Law, Research Centre 1997, English Speaking Section, *infra*, pp. 113 ff.

(11) See WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, *Japan - Taxes on Alcoholic Beverages*, Report of the Appellate Body of 4 October 1996, AB-1996-2, part G, c), and corresponding footnotes 66-67.

1947." This was done by providing that while they are not binding, these elements must be taken into account; in addition, it was specified that GATT 1947 panel reports do not constitute "other decisions of the Contracting Parties to GATT 1947" for the purpose of paragraph 1(b)(iv) of the language of Annex 1 A incorporating the GATT 1994 into the WTO Agreement ⁽¹²⁾.

e) Even if it has shown notable continuity in the passage from one multilateral agreement to another and has indicated a respect for its own precedents, the Appellate Body has not omitted to interpret each of the three series of multilateral agreements in light of its own peculiarities. A clear manifestation of such an approach can be found in the words used regarding the concept of like products. In the *Japan - Taxes on Alcoholic Beverages* case ⁽¹³⁾, it was specified that "[t]he concept of likeness is a relative one that evokes the image of an accordion: the accordion of likeness' stretches and squeezes in different places as different provisions of the WTO Agreement are applied" ⁽¹⁴⁾.

All of this has greatly enriched the connotation — already present in the provisions of the Marrakech Agreement — of the WTO as an integrated and, at the same time, flexible system.

6. *The relationship between WTO law and the international law system.*

The reference in Article 3(2) of the DSU to public international law has reopened a problem which had arisen regarding interpretation and application of the GATT 1947 — the problem of establish-

(12) See WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, *Japan - Taxes on Alcoholic Beverages*, Report of the Appellate Body of 4 October 1996, AB-1996-2, part E. "Status of Adopted Panel Reports," and corresponding footnotes p.29 ff. On the interpretative criteria utilized by the Appellate Body, see also BEHBOODI, R., "Legal Reasoning and the International Law of Trade: the First Steps of the Appellate Body of the WTO", Hague Academy of International Law, Research Centre 1997, English Speaking Section, *infra*, pp. 303 ff.

(13) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, *Japan - Taxes on Alcoholic Beverages*, Report of the Appellate Body of 4 October 1996, AB-1996-2.

(14) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, *cit.*, part H, a) "Like Products," and corresponding footnotes, p. 46 ff.

ing the relationship between that law and international trade law. The *Hormones* case ⁽¹⁵⁾ provides an important example. In March of 1987, following the European Community's adoption of a directive to ban the import of animals or meat from animals raised on hormones, the United States contested the legitimacy of this measure under the Tokyo Round Agreement on Technical Barriers to Trade (TBT Agreement), submitting that the EC prohibition constituted a non-tariff barrier which was not supported by scientific assessment. A procedure initiated pursuant to that Agreement was blocked by the EC. The US adopted countermeasures and the EC responded by asking that a panel be set up. In turn, the US invoked the general international law doctrine of "fall-back", arguing that since the sanctioning mechanism provided for by the TBT Agreement had been blocked, reliance on the general means of self-help under international law were legitimate ⁽¹⁶⁾. The EC, on the contrary, maintained that the blockage of the special remedies provided for by the TBT Agreement was an integral element of a "closed system" which, in any event, did not permit the invocation of general remedies under international law.

Today the problem is posed in different terms. Undoubtedly the important improvements brought by the WTO to the international trading system have further "closed" the system, though it is not yet clear whether this system has become distinct from international law, or whether it remains within the domain of international law, operating as a sort of sub-system within the meaning of the International Law Commission's State Responsibility Reports ⁽¹⁷⁾.

(15) For discussion on the various stages of this trade dispute and the decisions reached in the WTO Panel and the Appellate Body Reports, see WYNTER, M., "*The Agreement on Sanitary and Phytosanitary Measures in Light of the WTO Decisions on Ec Measures concerning Meat and Meat Products (Hormones)*", Hague Academy of International Law, Research Centre 1997, English Speaking Section, *infra*, pp. 471 ff.

(16) FERNÁNDEZ PONS, J., "*Self-Help and the WTO*", Hague Academy of International Law, Research Center 1997, English Speaking Section, *infra*, pp. 55 ff.

(17) See the Fourth Report on State Responsibility by Gaetano ARANGIO-RUIZ, Special Rapporteur, doc. A/CN. 4/440, 19 July 1991, par. 114-116 and discussion in *YILC*, 1992, vol. I, p. 139.

This issue takes on numerous forms including determination of principles referred to in the interpretation of the Marrakech Agreements, as well as the application of international rules such as those relative to the exhaustion of local remedies and those relating to liability for damages.

The first problem is one of establishing how the reference to customary rules of interpretation of public international law found in Article 3(2) of the DSU is to be understood: are the rules of interpretation contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties to be strictly adhered to, or may they be regarded in a broader sense so as to include other interpretative rules at work in the present international order (and thus recalling that in this order general principles of law are created by countries party to the Statute of the International Court of Justice)? The second problem lies in determining whether or not unilateral accession to the WTO Panel procedure is subject to the same condition of prior exhaustion of internal remedies generally required under international dispute settlement mechanisms. A third issue deals with a Member State's possibility of seeking reparation for damages caused by another member through his willful action or negligence. This case is one of verifying the significance of the provisions contained in Article 23 of the DSU which provides: "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objectives of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding".

The solution to these problems, even if the improvements brought by WTO law to the international trade legal system close that system somewhat, cannot be found by merely considering the system as "self-contained." The context in which Article 3(2) of the DSU was created, as already indicated, was characterized by a heated debate on the autonomy of international trade, distinct from public international law. In this context, the reference to customary rules of public international law can only point to a decisive overcoming of the debate which preceded Marrakech and a deliberate movement towards the creation of a special system situated within the frame of a larger international system, a system of rules "not to

be read in clinical isolation from public international law" (18). To maintain, however, that WTO law is situated in the frame of a larger international legal system is not to say that it carries the weight of and is widely integrated by all the rules of general international law.

GATT 1947 law was characterized by the imposition upon Contracting Parties of vague obligations, and in relation to these obligations, a series of customary law principles and rules often relied upon in international conventions containing somewhat non-specific rules were applied. Consequently, the GATT rules were progressively clarified so that eventually they could no longer be treated as soft law. Recognition by the Contracting Parties of a growing customary practice resulted, for example, in a more concrete promotion of the most useful effect of GATT rules, characteristically leading to the progressive transformation of soft conventional law into less soft conventional law.

This important transformation was accompanied by the entry into force of the Marrakech Agreements and of the working of their substantial rules together with the DSU, causing the premises for a wide integrative application of those principles and rules to be weakened. This does not mean, however, that the new Marrakech law, in its application, will not bring about integrations. Any such integrations, when possible and necessary, will certainly be affected by the fact that the new system, to the extent that it embodies detailed and stringent legal obligations, is less permeable than the previous system, hence less susceptible to integrations from rules foreign to it, whether these be autonomous customs or interpretative customs.

Once it is assumed that with the entry into force of the Marrakech law the application of the DSU, because of the novelty of its elements, demands a very careful approach towards the valorization of all its internal components, it follows that the integration of rules foreign to it will not occur automatically, but rather, selectively,

(18) WT/DS2/AB/R, *United States - Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body of 29 April 1996, AB-1996-1, p. 17.

taking into account all these elements ⁽¹⁹⁾. Consequently, as implied above, recourse to their application will take place only to the extent that they are compatible with the objective will of the Contracting Parties as expressed in the text of the agreement and with the goals which, unequivocally, such objective will intend to pursue. Where this compatibility does not exist, it would be contrary to the useful effect of the Marrakech conventional law to maintain that customary rules foreign to this convention could be applicable to its integration. The finding of such incompatibility would not imply that the parties' will was to put in place a conventional regime destined to operate in derogation from the established rules of general international law.

7. *The problem of the exhaustion of local remedies.*

If attention is paid to the will of the Contracting Parties as expressed in the Marrakech texts and to the objectives pursued in them with the establishment of an integrated system for dispute resolution, it must be pointed out that said will and objectives coincide with those which have characterized the establishment of the most recent international systems for the settlement of disputes in the field of international trade beginning with the ones created between the United States and Canada and among the United States, Canada and Mexico ⁽²⁰⁾.

The Contracting Parties' objective has been "to level the playing field" so that less powerful countries will feel more confident in negotiating with more powerful ones ⁽²¹⁾. This objective has been a qualifying feature of the DSU because the introduction in it of an efficient and expeditious dispute settlement system was the trade-off

(19) For an application of this method even in the GATT 1947 experience, see MCGOVERN, E., "Dispute Settlement in the GATT - Adjudication or Negotiation", in HILF, JACOBS & PETERSMANN, (Eds.) *The European Community and GATT*, Kluwer, Deventer, 1986, at p. 79.

(20) On these systems, see OELSTROM, K.L., "A Treaty for the Future: The Dispute Settlement Mechanism of NAFTA", in *Law and Policy in International Business*, 1994, pp. 783 ff.

(21) OELSTROM, *op. cit.*, p. 785.

and the decisive factor for the adoption of both the DSU and the Marrakech Agreements ⁽²²⁾. The developing countries accepted to have only one integrated system, including trade in services and intellectual property rights, solely because of the creation of such a dispute settlement mechanism. They would not have accepted the integrated system that came out of the Uruguay Round if this mechanism did not provide for speedy settlements ⁽²³⁾. For them, still more than for developed countries, time is money; for them an expeditious settlement in many instances is vital.

The aforementioned arguments, drawn from the negotiating history of the Uruguay Round, exclude the compatibility of the Understanding with the principle of the exhaustion of local remedies. The arguments derive their strength from the fact that, due to the importance of a teleological interpretation of the agreements, their application must take into account the historical and political thrusts and inspiring principles which have assumed a determining role in their evolution. This strength is further confirmed with additional considerations inferred by a systematic interpretation of the Understanding and by a re-examination of the elements of the customary rule of the exhaustion of local remedies.

Taken as a whole, the DSU provisions express an effort to establish a multiplicity of instruments to facilitate the settlement of disputes. This effort is characterized by the promotion of the rapid settlement of disputes rather than the imposition of formal rules of procedure aimed at preventing an overlapping of different procedures. This explains why, for instance, Article 25 of the DSU provides for resort to "expeditious arbitration" whenever it "can facilitate the solution of certain disputes" as "an alternative means of

(22) For the characterization of the DSU as an element of a "total package", see JACKSON, J., *Testimony prepared for the US Senate Committee on Foreign Relations*, in *Hearing on the World Trade Organization and US Sovereignty*, June 19, 1994, p. 2.

(23) For the application of the speedy settlement principle in the practice of panels within the context of GATT 1947, see e.g. PETERSMANN, E.U., *Settlement of International and National Trade Disputes through the GATT - The Case of Antidumping Law*, in PETERSMANN & JAENICKE, (Eds.) *Adjudication of International Trade Disputes in International and National Economic Law*, Freiburg University Press, 1992, pp. 89 ff.

dispute settlement" to the panel system; it also explains why Article 5 of the DSU states that the parties to a dispute may "agree that procedures for good offices, conciliation and mediation continue while the panel process proceeds" (24).

With these provisions, the Understanding proves to be characterized above all by a "rule-oriented" approach. It has been adapted to face the same needs which shaped the rule of exhaustion of local remedies though in a different manner. The Understanding prescribes in paragraph 7 of Article 3 that "before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful" (25). The satisfaction of these needs is left to the unilateral judgment of the complaining State rather than to a formal procedural rule (even that of the need to avoid international tensions which could favour the application of the principle of exhaustion of local remedies (26)).

The conventional rules of the new international trade law fall within the special context of the international law of economic development which aims to adopt less formal features than those of classic international law. It is, in fact, characterized by broad and general derogation from features of classic international law. For this reason, a principle enunciated by a Chamber of the International Court of Justice (composed of Judges Ruda, Oda, Ago, Schwebel and Sir Jennings) is unsuitable in reference to the DSU. This Chamber found itself "unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so" (27). This principle, asserted in reference to a

(24) For an explicit reference to the concept of reasonable delay, see CANAL-FOURGES, E., "*Le système de Règlement des Différends de l'Organisation Mondiale du Commerce*", in *RGDIP*, 1994, pp. 689 ff.

(25) For a more complete discussion of the Uruguay Round DSU committees to prevent vexatious litigation, see KOHONA, P., "*Dispute Resolution under the World Trade Organization - An Overview*", in *JWT*, 1994, pp. 29 ff.

(26) As assumed by KUYPER, P.J., "*The New WTO Dispute Settlement System: The Impact on the Community*", in BOURGEOIS, BERROD & GIPPINI FOURNIER, (Eds.) *The Uruguay Round Results, A European Lawyers' Perspective*, College of Europe, Bruges, 1995, pp. 87 ff. at p. 106.

(27) *ELSI* case, *ICJ Reports*, 1989, pp. 15 ff.

1948 bilateral Treaty of Friendship, Commerce and Navigation between the United States and Italy, belongs to traditional international law and certainly not to the new *corpus juris* established by the multilateral law of international trade.

If we then reexamine the elements of the customary rule of the exhaustion of local remedies, we must depart from the fact that this rule is a non-mandatory rule of customary law, and as such, its derogation is possible. To this, we must add that when the rule was incorporated into an important conventional instrument — Article 26 of the 1950 Rome Convention on Human Rights — it was accompanied by an affirmation in Article 6 of the right to obtain justice within a reasonable period of time. Significantly, the case law of both the European Commission on Human Rights and the European Court of Human Rights holds that the rule of exhaustion of local remedies may not prevent recourse to the European Convention institutions when an unreasonable delay may impair the right to justice. This case law demonstrates that the rule of exhaustion of local remedies is not endowed with absolute value. Furthermore, the question must be asked whether, given the general content usually attributed to the local remedies rule, the local remedies rule could have been incorporated with this same general content when at the time of the Uruguay Round many States (particularly weaker ones) had recognized the vital benefit of an expeditious dispute-settlement mechanism and when there already existed a series of specialized multilateral mechanisms akin to the one prescribed by the DSU (28).

(28) The text of the DSU suggests a negative answer to this question since it sanctions the concrete application of the principle of an expeditious settlement of disputes when, it, *inter alia*, a) establishes very short terms for the different stages of the procedures it provides for and b) expands this principle up to the implementation of recommendations and decisions concluding these procedures. Significantly, as far as timing is concerned, Art. 26 states that “a guideline (le “principe” in the French version) should be that the reasonable period of time to implement the panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report”.

8. *The concrete application in WTO law of principles other than those expressed in the Vienna Convention on the Law of Treaties.*

The criteria governing the integration of WTO law with principles and rules of general international law must be understood in a broad sense. Reference to the "customary rules of interpretation of public international law" in Article 3(2) of the DSU is not limited to Articles 31 and 32 of the Vienna Convention. Two important positions have been taken in this regard, one in the Panel report of January 17, 1996 in the *Reformulated Gasoline* case, ⁽²⁹⁾ and another in the Appellate Body report of January 16, 1998 in the *Hormones* case ⁽³⁰⁾.

In the first case the Panel was called upon to interpret GATT Article XX (g). This Article provides that nothing in the Agreement shall be construed to prevent the adoption or enforcement by any Contracting Party of measures "relating to the conservation of exhaustible natural resources". Disregarding Venezuela's decisive opposition and recalling panel decisions taken under GATT 1947, this Panel found that "a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX(g)".

(29) *United States - Standards for Reformulated and Conventional Gasoline*, report of the Panel of 16 January 1996, WT/DS2/R. On this case see NOGUEIRA, G., "The First WTO Appellate Body Review: *United States- Standards for Reformulated and Conventional Gasoline*", in *JWT* 1996, Vol. 30 n. 6, pp. 5 ff.; ROBERT, E., "L'affaire des normes américaines relatives à l'essence: le premier différend commercial environnemental à l'épreuve de la nouvelle procédure de règlement des différends de l'OMC", in *RGDIP*, 1997, pp. 91 ff.; SCHULTZ, J., "The Demise of 'Green' Protectionism: the WTO Decision on the US Gasoline Rule", in *Denv. J. Int'l & Pol'y*, Vol. 25 no. 1, 1996, pp. 1 ff.; SNODERLY, A. B., "Clearing the air: environmental regulation, dispute resolution, and domestic sovereignty under the World Trade Organization", in *N.C.J. Int'l & Com. Reg.*, Vol. 22, 1996/97, pp. 241 ff.; WAINCYMER, J., "Reformulated Gasoline under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora out of a Chapeau?", in *Mich. J. Int'l L.*, Vol. 18, 1996/97, pp. 141 ff.; ZARRILLI, S., "Trade and Environment: the Rules, Panels and Debate in the World Trade Organization", in *World Competition*, Vol. 20, 3/1997, pp. 93 ff.

(30) WT/DS28/AB/R, WT/DS48/AB/R, *EC Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body of 16 January 1998, AB-1997-4.

In taking this position, the Panel opted for an evolutive interpretation consistent with a principle of environmental protection. This interpretation of the provisions is supported by the Preamble to the Agreement establishing the World Trade Organization, whereby the Parties to the Agreement recognize that in conducting their relations allowance *should* be made, *inter alia*, for the optimal use of the world's resources in accordance with the objective of sustainable development, which seeks both to protect and preserve the environment. However, the real strength of the Panel's position, especially given the weak wording — *should* — in the preamble, derives undoubtedly from the fact that, external to WTO law, principles of environmental protection are experiencing growing and progressive affirmation in the international legal order.

In the *Hormones* case, the Appellate Body decided a dispute arising from American and Canadian reaction to a European Community directive banning the importation of animals or meat from animals raised on hormones. After a Panel made an adverse ruling, the United States brought its complaint to the Appellate Body, holding that the measure in question was incompatible with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures because it had been instituted and upheld pursuant to a risk assessment which was not based exclusively on scientific evidence. The Appellate Body agreed that the measure was to be reviewed because the risk assessment had not been adequately performed. However it affirmed that the ascertainment of risk to human health entails more than quantitative scientific analysis based on laboratory methods typical of the physical science; also to be considered are "risks in human societies as they actually exist, in other words ... the actual potential for adverse effects on human health in the real world where people live and work and die" (31).

In reviewing the Panel's findings, the Appellate Body introduced into its interpretation of risk assessment a principle of protection of social values. This principle, at variance with what has done with reference to the principle of environmental protection in the *Refor-*

(31) WT/DS26/AB/R, WT/DS48/AB/R, cit., par. 187.

mulated Gasoline case ⁽³²⁾, the Appellate Body has clearly derived from external sources. In relying on such a principle, the Appellate Body unequivocally indicated that the interpretation of the Marrakech Agreements entails more than just the systematic interpretation of the rules explicitly laid forth in it and in a narrow reference to Articles 31 and 32 of the Vienna Convention: principles of a social nature, springing from the experience of each member and deriving from the international legal principle of State sovereignty, are also to be considered.

9. *The general exceptions to the working of the WTO liberalization principles.*

The Appellate Body's delicate task of interpretation and coordination in the two cases cited in the discussion above was carried out by drawing upon principles of general international law. It is important and deserves careful reflection, other than on the results to which it led, on the general methodological problems which are raised. Notably, when an agreement sanctions a rule which plays a principle role within that agreement, and then provides for exceptions with respect to its application, these exceptions are usually interpreted narrowly. In the *Reformulated Gasoline* case, in order to arrive at the interpretation of general exceptions provided for in Article XX (g), the Appellate Body stated that "the phrase in question" ('related to the conservation of natural resources') "may not be read so expansively as seriously to subvert the purpose of Art. III:4. Nor may Art. III:4 be given so broad a reach as effectively to emasculate Art. XX(g) and the policies and interests it embodies" ⁽³³⁾. The affirmation is reshaped by the fact that, in deciding the case, the Appellate Body held that the measure taken by the United States could not be justified on the basis of Article XX due to its

(32) *United States - Standards for Reformulated and Conventional Gasoline*, report of the Panel of 16 January 1996, WT/DS2/R.

(33) *United States - Standards for Reformulated and Conventional Gasoline*, report of the Appellate Body of 29 April 1996, AB-1996-1, WT/DS2/AB/R, p. 18.

incompatibility with this provision. In particular, Article XX establishes that a measure, even if apparently falling within the terms of the agreement, is unjustified if it constitutes an arbitrary discrimination. Nevertheless the principle was affirmed, which was of great importance to the US, whose environmental circles were paying close attention to the stand taken by the Appellate Body. From here on, a narrow construction of the concept of “measures relating to the conservation of natural resources” certainly will not be possible.

10. *The problem of damages.*

An additional issue to be resolved is that of liability and restitution for damages caused by another member’s willful or negligent behavior. This problem requires clarification of the weight and effect to be attributed to Article 23 of the DSU within the frame of the WTO system. Article 23 provides: “When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under covered agreements or an impediment to the attainment of any objectives of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.” This raises the question of whether the obligation imposed by the provision “to have recourse to and abide by the rules and procedures” of the Understanding is relative or absolute in nature.

Considered in the pure sense of the DSU and of the scope attributed to it by the wording of its heading “Strengthening of the Multilateral System”, it can be inferred that the obligation is of an absolute nature. Attribution of an exclusive character to the means of redress provided for by the WTO can better strengthen the multilateral system. Simply stated, if each member were to maintain the right to make recourse to redresses other than those provided for by the WTO — such as the right to demand restitution outside the WTO dispute settlement system — the system might relapse into a non-multilateral methodology capable of leading to solutions which are effective only bilaterally.

The problem, however, is more complex. As we have seen, the main scope of the GATT 1947 and the WTO systems is unequivocally characterized in the objective to promote international trade

and maintain progress achieved within the system by assuring that every subsequent development is protected to the greatest extent possible from short-term disturbances. In light of the pragmatic approach which characterized the adoption of the GATT 1947 and which certainly was not abandoned with the adoption of the WTO, it would be difficult to argue that the pursuit of this objective necessitates the exclusion of remedies external to the WTO. The pragmatic approach still inspiring the WTO legal system, coupled with the fact that this system today is characterized as a system which does not exist "in clinical isolation from public international law" ⁽³⁴⁾, points to the inclusion of fundamental principles of law such as liability for unjust damage or harm. The WTO, placing as its ultimate goal the furthering of trade, is understandably limited to providing for "prospective redress"; however it is not reasonable to view the system as absolutely excluding the possibility of evaluating past damage. Such a reconstruction is inconsistent with the promotion of equity and justice.

Still, the problem is not concretely resolved. The determination of how and by whom issues of restitution for damages should be handled is left open. With no basis in the WTO system, this matter might be confronted through reference to the more rudimentary means of classic international law ⁽³⁵⁾.

11. *The prohibition of nullification and impairment of benefits and non-violation complaints.*

In addition to violation complaints, GATT 1947 did provide for non-violation complaints ⁽³⁶⁾. The provision for non-violation complaints was closely tied to the substantially economic approach which permeated the entire agreement. In the interest of promoting

(34) *United States - Standards for Reformulated and Conventional Gasoline*, report of the Appellate Body of 29 April 1996, AB-1996-1, WT/DS2/AB/R, p. 17.

(35) On the principle of self-help with reference to the WTO system, see FERNÁNDEZ PONS, J., "Self-Help and WTO", cit., *infra*, pp. 55 ff.

(36) See WILLIAMS, B.G., "Non-Violation Complaints in the WTO System", Hague Academy of International Law, Research Centre 1997, English Speaking Section, *infra*, pp. 677 ff.

the development of trade, its application in conjunction with the rules of most favored nation and national treatment — considered essential for the objective's pursuit — was instrumental to insuring that every subsequent development was sheltered from short-term disturbances. Pragmatism was key. International trade had to be advanced even in the event of unforeseen and sudden social exigencies which might lead a State to behave in a manner that, while technically consistent with the rules, eroded in some way the intended benefits.

Arising out of this economic approach, application of the idea of nullification and impairment of benefits has become central in the modern international trade law system. The original Contracting Parties of GATT 1947 were defensive of their sovereignty and reluctant to assume legal obligations; rather, they found it more palatable to grant each other benefits and to commit to equitably maintain the substantial equilibrium reached through reciprocal trade.

The idea of prohibiting nullification and/or impairment of benefits was carried forth into the WTO agreements. Its continued importance can be seen in Article 8(3) of the DSU which establishes that "in cases when there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment."

Panel case law has generally if not exclusively sanctioned only concrete cases of violation complaints. However, the possibility remains for the idea of nullification or impairment of benefits to be extended also to situations of non-violation complaints. In this broader context the significance of the prohibition has visibly augmented since the entry into force of the WTO.

For the entire period during which the GATT 1947 was in force the possibility for a non-violation complaint to take on a concrete significance was neutralized by the procedure of positive consensus, a procedure which had handicapped even dispute settlement regarding clear cases of violation complaints. Under the new system, panels are established and reports are adopted by a negative consensus procedure. This has encouraged the Contracting Parties to advance also non-violation complaints. Furthermore, the results of the Uruguay Round have extended GATT 1947's original objective of ensuring equal opportunities of competition with reference to

foreign and domestic goods to services. Thus these objectives function in the much wider frame of the multilateral agreements which, as already illustrated, have been regarded by the Appellate Body as constituting an integrated system.

Due to this fact that the WTO in its entirety has come to constitute an integrated system, the need to guarantee the useful effect of international trade rules has expanded. The broader the system, the greater the risk exists that attempts will be made to circumvent it. Non-violation complaints play a role of increasing importance in confronting just such a risk.

The obligation under customary international law to carry out and interpret treaties in good faith so as to prevent their rules from being deprived of meaning or made redundant may seem to be sufficient to manage the guarantee of useful effect; however difficulties often ensue in establishing when a subject of international law has not honoured an obligation to interpret and apply a treaty in good faith. GATT 1947 dealt with this problem by adding to the obligation a right of action with reference to non-violation complaints aimed not only at preventing debate on the matter, but above all — and even more important under the WTO system — aimed at overcoming the subjective and psychological limits inherent to its application. Non-violation complaints claims were successfully made under GATT 1947 only with regards to unforeseen trade measures which nullified or impaired benefits that could be reasonably expected under tariff concessions undertaken pursuant to Article II ⁽³⁷⁾; now, such claims may be raised also with respect to obligations other than tariff concessions ⁽³⁸⁾.

(37) Only in one GATT 1947 case “did the complaining party claim that the benefit denied was not improved market access from tariff concessions granted under GATT Article II, but rather GATT Article I:1 (‘most favored nation’) treatment with respect to unbound tariff preferences granted by the EC to certain Mediterranean countries.” It was in the *EC - Citrus Products* case (GATT Doc. L/5776, dated 7 February 1985), whose report was unadopted. See footnote 1223 in *Japan - Measures Affecting Consumer Photographic Film and Paper*, Report of the Panel of 31 March 1998, WT/DS44/R.

(38) See MALAGUTI, M. C., “*Restrictive Business Practices in International Trade and the Role of the World Trade Organisation*”, Hague Academy of International Law, Research Centre 1997, English Speaking Session, *infra*, pp. 611 ff.

Obviously, wider acceptance of non-violation complaints will be linked to a verification of the three prerequisites to making such a complaint set forth in Article XXIII:1(b). Invocation of the remedy will not be successful in every claim of nullification or impairment; certain criteria must be met in order for the claim to be heard, including: (1) the application of a measure by a WTO Member; (2) the existence of a benefit accruing under the relevant agreement; and (3) a nullification or impairment of the benefit as a result of the application of the measure. In addition, it is necessary that the nullification or impairment, even beyond action in bad faith on the part of the WTO Member who adopts a measure, can be held to violate the legitimate expectations of another Member in regard to those benefits ⁽³⁹⁾. Furthermore, the burden of proof is incumbent on the complainant ⁽⁴⁰⁾.

12. *WTO and EC Law.*

Problems of the relationship between WTO law and Community law are specifically confronted in the GATT in Article XXIV and the GATS in Article V. These articles specify that participation by Member States in a customs union or free trade area (GATT Art. XXIV), or in a "wider process of economic integration or trade liberalization" (GATS Art. V) need not entail according National Treatment (NT) or Most Favoured Nation (MFN) treatment to equal extents both within and outside the customs union or free trade

(39) On the notion of legitimate expectation see the bibliography quoted in MINGOZZI, P., "*Evolution de la méthode suivie par la jurisprudence communautaire en matière de protection de la confiance légitime*", in RMUE, 1997, p. 13 ff.

(40) Regarding a careful verification of the criteria, see the recently adopted panel report in *Japan - Measures Affecting Consumer Photographic Film and Paper* (Report of the Panel of 31 March 1998, WT/DS44/R). This is the first non-violation complaint following the entry into force of the WTO. Having defined the purpose of Art. XXIII:1(b) as being that of protecting "the balance of concessions under GATT by providing a means to redress government actions not otherwise regulated by GATT rules that nonetheless nullify or impair a Member's legitimate expectations of benefits from tariff concessions," the panel deemed that none of the distribution measures considered could give rise to a non-violation complaint.

area, provided that the balance of obligations and benefits already existing among the WTO Members is respected.

The same does not hold true with respect to the TRIPS agreement ⁽⁴¹⁾. Here the principle of MFN functions without limitation in the relationship between the Community, its Member States, and third countries which are Members of the WTO. Consequently, consideration of the rules of exhaustion of intellectual property rights (IPR) and of parallel imports — traditionally affirmed in the Community experience — as of Community and not international application is problematic, and may become particularly controversial in light of the fact that the provisions of TRIPS are generally deemed as potentially directly applicable.

In any case, WTO law will have an impact on the institutional life of the EC ⁽⁴²⁾. This has already been demonstrated by the stance taken by the US in *European Communities - Customs Classification of Certain Computer Equipment* ⁽⁴³⁾ and by the arguments brought by the US and Canada before the Arbitrator appointed to establish the reasonable period of time within which the EC must comply with the recommendations adopted by the DSB in the *EC Measures Concerning Meat and Meat Products (Hormones)* case ⁽⁴⁴⁾.

One important question in the *European Communities - Customs Classification of Certain Computer Equipment* case had to do with the issue of responsibility for a violation. The United States had first requested consultations with the European Community, after which it expressed that it appreciated the fact that there existed no

(41) See EINHORN, T. "The Impact of TRIPS (Trade-Related Aspects of Intellectual Property Rights) on EC Law: A Challenge to Regionalism", Hague Academy of International Law, Research Centre 1997, English Speaking Section, *infra*, pp. 540 ff.

(42) See BARONCINI, E. "The WTO Dispute Settlement Understanding as a promoter of transparent, rule-oriented, mutually agreed solutions - A study on the value of DSU consultations and their positive conclusion", *cit.*, paras. 15 and 16, *infra*, pp. 275-302.

(43) *European Communities - Customs Classification of Certain Computer Equipment*, Report of the Panel of 5 February 1998, WT/DS62/R.

(44) *EC Measures Concerning Meat and Meat Products (Hormones)*, Arbitration under Article 21.3 (c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes of May 29 1998, WT/DS29/15, WT/DS48/13.

centralized Community customs authority and affirmed that the Community had declared itself incapable of controlling the customs classifications adopted by each of its Member States for goods coming from third countries. The United States then asked for consultations with the United Kingdom and with Ireland, whose customs authorities had allegedly violated Article II of the GATT in their classifications of American computer equipment. Among the various questions brought to the panel's attention, the United States requested a precision as to whether the EC or the United Kingdom and Ireland should assume responsibility for the breach of WTO obligations towards the United States.

In the second controversy, the EC had requested a four-year implementation term to fulfill the obligations set out by the DSB recommendations following the *EC Measures Concerning Meat and Meat Products (Hormones)* decision. The request was based on the type of decisional mechanism required by the EC institutional system in order to adopt a new directive abolishing or amending the current measure banning imports of meat and meat products derived from cattle administered with certain hormones for growth promotion purposes.

The legal basis relied upon for the adoption of Directive 96/22 — the measure deemed by the WTO panel and Appellate Body as inconsistent with the SPS Agreement obligations undertaken by the EC — was Article 43 of the EC Treaty which entailed a qualified majority vote of the EU Council after consultation with the European Parliament. A new measure, the EC said, would have to be based upon Article 100 A ECT, requiring the much more complex codecision procedure. The United States and Canada did not hesitate to object to the EC's request, insisting that the EC adopt the new measure on the same legal basis used for the original directive, a decisional mechanism which may be completed within five or six months.

Faced with the very sensitive institutional issue of the choice of proper legal basis for EC acts, the Arbitrator rejected the EC's request for a term of two years to conduct hormone-specific and residue-specific risk assessments for all the hormones in question, including an evaluation of the risks posed to human health from

failure to observe good veterinary practice, but determined that a period of fifteen months to implement the new EC measure based on the codecision procedure was reasonable. The Arbitrator reached this decision based firstly on new provisions which will enter into force with the Treaty of Amsterdam on January 1, 1999, according to which veterinary and phytosanitary measures having as their objective the protection of public health must be adopted by means of the codecision procedure provided for in Article 189 B ECT, and secondly on the EC's commitment that "upon entry into force of the Treaty of Amsterdam, any legislative proposal initiated under the consultation procedure provided for in Article 43 would have to be withdrawn and reinitiated under the co-decision procedure provided for in Article 189 b of the EC Treaty" (45).

13. *The standard of review to evaluate the consistency with WTO law of measures enacted by the Members.*

The standard of review indicates "the degree of deference" that the WTO and third party bodies "should afford to the determinations of national authorities" (46). To this regard, only the Anti-dumping agreement contains a provision. Article 17.6 of this agreement establishes that when a panel reviews anti-dumping matters:

"(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of those facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of

(45) WT/DS29/15, WT/DS48/13, cit., par. V.5.

(46) GOMULA, J. "The Standard of Review of Art. 17.6 of the Anti-Dumping Agreement and the Problem of Its Extension to other WTO Agreements", Hague Academy of International Law, Research Centre 1997, English Speaking Section, *infra*, pp. 579 ff.

public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it results upon one of those permissible interpretations."

The weight given to Article 17.6 is of particular interest since a Ministerial Decision adopted during the Uruguay Round establishes that "the standard of review in paragraph 6 of Article 17 ... shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application" ⁽⁴⁷⁾. It is possible that the requirement of according a degree of deference to the determinations of national authorities will be extended to all of the WTO agreements.

Several WTO Members have attempted — by interpretative means — to extend the standard of review contained in Article 17.6 of the Anti-Dumping Agreement to other agreements such as the Agreement on Textiles and Clothing ⁽⁴⁸⁾ and to the SPS agreement ⁽⁴⁹⁾. The response given by the WTO panels and Appellate Body in their reports to such efforts has been consistently and decisively negative.

With specific reference to the SPS Agreement, the EC, in the *Hormones* case, had appealed certain findings of the panel on the grounds that it "failed to apply an appropriate standard of review in assessing certain acts of, and scientific evidentiary material submitted by, the European Communities" ⁽⁵⁰⁾. According to the EC, the

(47) See the text in *The Results of the Uruguay Round of Multilateral Trade Negotiations - The Legal Texts*, WTO, Geneva, 1995, p. 453.

(48) On these cases, see GOMULA, J. "The Standard of Review of Art. 17.6 of the Anti-Dumping Agreement and the Problem of Its Extension to other WTO Agreements", cit.

(49) See GOMULA, J. "The Standard of Review of Art. 17.6 of the Anti-Dumping Agreement and the Problem of Its Extension to other WTO Agreements", cit., *infra*, at p. 608 and WYNTER, M. "The Agreement on Sanitary and Phytosanitary Measures in the Light of the WTO Decisions on EC Measures Concerning Meat and Meat Products (*Hormones*)", cit., *infra*, pp. 494-495.

(50) *EC Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body of 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R, par. 110.

panel should have applied not a *de novo* standard — which allows a panel “complete freedom to come to a different view than the competent authority of the Member whose act or determination is being reviewed” — but, instead, a “deference” standard pursuant to which “a panel ... should not seek to redo the investigation conducted by the national authority but instead examine whether the procedure’ required by the relevant WTO rules had been followed” ⁽⁵¹⁾.

In particular, the EC suggested to the Appellate Body to extend the “deferential reasonableness standard” of Article 17.6 of the Anti-Dumping Agreement to “all highly complex factual situations, including the assessment of the risks to human health arising from toxins and contaminants” ⁽⁵²⁾. The Appellate Body, after having observed that the SPS Agreement “is silent on the matter of an appropriate standard of review for panels deciding upon SPS measures of a Member”, that there are no “provisions in the DSU or any of the covered agreements (other than the Anti-Dumping Agreement) prescribing a particular standard of review” and that there is “no indication in the SPS Agreement of an intent on the part of the Members to adopt or incorporate into that Agreement the standard set out in Article 17.6(i) of the Anti-Dumping Agreement”, stated that:

“The standard of review appropriately applicable in proceedings under the SPS Agreement, of course, must reflect the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves. To adopt a standard of review not clearly rooted in the text of the SPS Agreement itself, may well amount to changing that finely drawn balance; and neither a panel nor the Appellate Body is authorized to do that.” ⁽⁵³⁾

It is therefore evident how third party bodies firmly refused to compromise their discretionary power to evaluate the compatibility

(51) WT/DS26/AB/R, cit., par. 111.

(52) WT/DS26/AB/R, WT/DS48/AB/R, cit., par. 113.

(53) WT/DS26/AB/R, WT/DS48/AB/R, cit., par. 115.

with the WTO system of national practices and measures, solidly rooting this position in the wording and spirit of the Marrakech Agreements. Here it is worth reiterating that a cross-fertilization process is possible between the various agreements making up the WTO system, but this may only occur where it is consistent with the objectives and interests of the WTO trading system. If there is any doubt, these objectives and interests "should always prevail. One of the goals of the WTO dispute settlement system is to provide security and predictability to the multilateral trading system, and one of its essential functions is to preserve the rights and obligations of Members (Art. 3.2 of the DSU). This can only be achieved if priority is given to ensuring uniformity, to the largest extent possible, of the interpretation and application of WTO law, including anti-dumping regulations" (54).

14. *External elements favouring the implementation of WTO rules.*

It has always been said that the best way to ensure the proper implementation of international trade rules is to enhance the role of private economic operators. They have a direct interest in lowering barriers to trade in order to develop their activity and to carry it out under the best possible conditions of fair competition (55).

(54) GOMULA, J. "The Standard of Review of Art. 17.6 of the Anti-Dumping Agreement and the Problem of Its Extension to other WTO Agreements", cit., at p. 605.

(55) See PETERSMANN, E.U., "The Transformation of the World Trading System Through the 1994 Agreement Establishing the World Trade Organization", in *EJIL*, 1995, p. 202 ff.; Id., "Application of GATT by the Court of Justice of the European Communities", in *CML Rev.*, 1983, p. 397 ff. On the issue of direct applicability see also BOURGEOIS, [HJ], "Effects of International Agreements in European Community: Are the Dice Cast?", in *Mich. L. Rev.*, 1983/84, pp. 1250 ff; EECKHOUT, P., "The Domestic Legal Status of the WTO Agreement - Interconnecting Legal Systems", in *CML Rev.*, 1997, p. 11 ff; EHLMANN, C.D., "Application of GATT Rules in the European Community", in HILF, JACOBS & PETERSMANN, (Eds.) *The European Community and GATT*, cit., p. 127 ff; EINHORN, T., "The Application of WTO law by the Courts of Law in the EU and in Israel", in RABELLO A. M., (Ed.), *Essays on European Law and Israel*, Jerusalem, The Sacher Institute for Legislative Research and Comparative Law, The Hebrew University of Jerusa-

Practice following the adoption of the Marrakech Agreements led to developments in three directions. One movement advocated a reform of the system so as to allow individuals access to the DSB mechanisms. This movement did not achieve any success, nor is not likely to in the near future, because States are reluctant to accept the limits on their sovereignty which are implied by such a reform. A second movement aimed to give individuals a voice regarding initiatives that Members could take to utilize international remedies at their disposition. The third movement sought to advance, as far as possible, the direct applicability of WTO rules in national courts.

15. *The new EC Trade Barriers Regulation (TBR) and private economic actors' access to the DSU remedies.*

One characteristic common to the great powers who are Members of the WTO is the predisposition for administrative procedures aimed at defining the means by which individuals or groups may request that the competent national authorities investigate practices of residents in third countries or of the countries themselves believed to be responsible for violations of WTO obligations. In this

lem, 1996, p. 1023 ff; ESPOSITO, C.D., "International Trade and National Legal Orders: The Problem of Direct Applicability of WTO Law", Hague Academy of International Law, Research Centre 1997, English Speaking Section, *infra*, pp. 429 ff.; GOVAERE, I., "The Reception of the WTO Agreement in the European Union: The Legacy of GATT", in DEMARET, P., BELLIS, J.F., GARCÍA JIMÉNEZ, G., (Eds.) *Regionalism and Multilateralism after the Uruguay Round - Convergence, Divergence and Interaction*, European Interuniversity Press, Brussels, 1997, p. 703 ff; HILF, M., "The Role of National Courts in International Trade Relations", in *Mich. J. Int'l L.*, 1996/97, p. 321 ff; KILLMAN, B. R., "The Access of Individuals to International Trade Dispute Settlement", in *Journal of International Arbitration*, 1996, p. 145 ff; LUKAS, N., "The Role of Private Parties in the Enforcement of the Uruguay Round Agreements", in *JWT*, 5/1995, p. 181 ff; MARESCEAU, M., "The GATT in the Case-Law of the European Court of Justice", in HILF, JACOBS & PETERSMANN, (Eds.) *The European Community and GATT*, cit., p. 107 ff; and, more generally, the resolution of the International Law Institute, "L'activité du juge interne et les relations internationales de l'Etat", 9th Commission, 66th Session, Milan, 1993, 7-9-1993, Rev. 1; CONFORTI, B., *Diritto Internazionale*, Editoriale Scientifica, Napoli, 1997, p. 298 ff.

way, national administrations are backed by those who have a direct interest in monitoring that third States observe their WTO commitments. These administrative procedures, though indirect, allow an individual to take part in the elimination of restrictive international trade practices by foreign undertakings or by other countries.

In this regard, the European Community, immediately following the conclusion of the Marrakech Agreements, adopted Regulation 3286/94 ⁽⁵⁶⁾ (the Trade Barriers Regulation or TBR). This regulation, replacing the prior Regulation 2641/84 ⁽⁵⁷⁾ dealing with trade protection, laid down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization.

This new EC TBR ⁽⁵⁸⁾ requires first of all that those wishing to make use of the instrument base their complaints exclusively on rules of international trade law which provide for a right of action for the Community. This eliminates uncertainties which had arisen due to the language used in the previous Regulation 2641/84, which had contemplated the introduction of complaints about violations of "generally accepted rules" and thus was susceptible to references to customary international law as well as soft law. On the one hand, a simple appeal to "generally accepted rules" allowed for a broader range of application of the procedure instituted by Regulation 2641/84 than what is now provided for in Regulation 3286/94. On the other hand, it required a prior analysis of the practice complained of under the heading of generally accepted rules, and moreover did not provide for excluded the possibility of raising non-violation complaints. By means of the specific requirement that complaints be based on questions for which international trade law provides for a right of action for the Community, the new EC TBR

(56) OJEC L349/71 of 31 December 1994.

(57) OJEC L252/1 of 1984.

(58) For a complete analysis of the genesis of Regulation 3286/94 and the new elements it introduces, see BRONCKERS, M. "Private Participation in the Enforcement of WTO Law: The New EC Trade Barriers Regulation", in *CML Rev.*, 1996, pp. 299 ff.

regulation has established a more solid and more certain legal basis for non-violation complaints. This legal basis is suited to the characteristics of the WTO system which itself contemplates "rights of action" in relation to violation complaints as well as non-violation complaints and situation complaints.

In addition, the new EC TBR regulation has introduced the so-called "third-track" procedure, simplifying the criteria for challenging illegal practices by third countries which hinder the access of EC industries in those foreign markets. The third-track procedure consists in granting standing not only to the EC Member States ⁽⁵⁹⁾ and to the European industry sectors ⁽⁶⁰⁾, as has traditionally been the case, but also to individual Community enterprises ⁽⁶¹⁾. A Community undertaking may now individually petition the Commission with a complaint of protectionist practices by third States which block access to their markets. In this case, there is no need to demonstrate that the entire Community industry in that sector has suffered injury because of the measures, but only that the foreign practices cause "adverse trade effects" ⁽⁶²⁾.

The new EC TBR regulation, like its predecessor, provides that the Commission shall undertake the investigation requested and follow through with all of the subsequent activities — consultations with the third countries, and in case of their negative conclusion, the initiation of dispute settlement proceedings provided for in the international agreement which has been breached, as well as the proposal to the Council of retaliation measures — if it is in the

(59) See Art. 6 of Regulation 3286/94, "Referral by a Member State."

(60) See Art. 3 of Regulation 3286/94, "Complaint on behalf of the Community industry," pursuant to which "[a]ny natural or legal person, or any association not having legal personality, acting on behalf of a Community industry which considers that it had suffered injury as a result of obstacles to trade that have an effect on the market of the Community may lodge a written complaint."

(61) See Art. 4 of Regulation 3286/94, "Complaint on behalf of Community enterprises," according to which "[a]ny Community enterprise, or any association, having or not legal personality, acting on behalf of one or more Community enterprises, which considers that such Community enterprises have suffered adverse trade effects as a result of obstacles to trade that have an effect on the market of a third country, may lodge a written complaint."

(62) See Art. 4 of Regulation 3286/94.

interest of the Community to do so ⁽⁶³⁾. This undoubtedly confers a certain discretion on the Commission to disregard the legal arguments raised by individual complainants in its response to them. Still, it is a long way from dictating the will of the Community in the exercise of the powers conferred on it by the regulation in question. The Court of Justice in the *Fediol* case ⁽⁶⁴⁾ ruled that the Community interest test is subject to judicial review, first at the Court of First Instance and afterwards, limited to points of law, at the Court of Justice of the European Communities.

Instruments such as Regulation 3286/94 grant a *locus standi* to individuals only with respect to protectionist practices affecting the market in third countries and not with respect to practices in the country where each individual works. Given this, it is not surprising that economic actors have sought to oppose trade barriers in the countries where they themselves work by invoking international trade law before the judicial authorities to bring to light measures of that country which are incompatible with that law.

16. *The potential direct applicability of the WTO rules: the stand taken by the EC Commission.*

The recognition of potential direct applicability of the WTO rules, despite the fact that it is widely supported in doctrine, was significantly conditioned by the United States' assertion, when deciding whether to participate in the WTO, that the rules were not invocable before its national courts. This attitude came as no surprise, the United States following a consolidated practice of leaving the responsibility of enforcing commercial agreements to the executive and the Congress, but it induced the EC Commission to promote a similar viewpoint in the form of a mirror legislation ⁽⁶⁵⁾ in the European Community. The Commission, in fact, presented

(63) See Art. 8 of Regulation 3286/94.

(64) *Fédération de l'industrie de l'huilerie de la CEE (Fediol), v. EEC Commission*, case 70/87, [1989] ECR 1781.

(65) See MINGOZZI, P., "Les droits des citoyens de l'Union européenne et l'applicabilité directe des accords de Marrakech", in *RMUE*, 1994, pp. 165 ff.

the Council and the European Parliament with a proposal for a decision to adopt the Marrakech Agreements the preamble of which included the following shocking recital: "Whereas these are inter-governmental agreements and it is therefore necessary to ensure that they cannot be directly invoked in Member States or Community Courts by private individuals who are natural or legal persons...." (66). This formula was then adopted by the Council upon the assent of the European Parliament, however the wording was modified (67) to read: "Whereas, by its nature, the Agreement establishing the WTO, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts...." (68). This reaction to practices of denying direct effect, followed by the Community's international partners, was by the

(66) COM (94), 143, p. 7.

(67) Basing the denial of direct applicability of the Marrakech Agreements, as proposed by the Commission, on their nature as intergovernmental agreements means excluding *a priori* the direct effect for every rule of conventional origin. Evidently, the Commission's position that these agreements are intergovernmental was not founded on the law, but instead constituted a last-resort political argument to face the concern provoked by the denial of direct applicability expressed by the US Congress when implementing the Uruguay Round's results. See MENGOZZI, P., "The Marrakech Dst and Its Implications on the International and European Level," in BOURGEOIS, J.H., BERROD, F., GIPPINI FOURNIER, E., (Eds.) *The Uruguay Round Results - A European Lawyers' Perspective*, College of Europe, Bruges, European Interuniversity Press, Brussels, 1995, pp. 115 ff., at p. 128.

(68) EC Council Decision No. 94/800 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986-1994), in OJEC L336/1 of 23 December 1994. What we will state in the text on the proper value to be attributed to the reported recital, which is our opinion since 1994, has been subsequently supported also by other scholars. See GAJA G., "Il preambolo di una decisione del Consiglio preclude al GATT 1994 gli effetti diretti nell'ordinamento comunitario?", in RDI, 1995, pp. 407 ff; PESCATORE, P., "The New WTO Dispute Settlement Mechanism", in DEMARET, P., BELLIS, J.F., GARCIA JIMÉNEZ, G., (Eds.) *Regionalism and Multilateralism after the Uruguay Round - Convergence, Divergence and Interaction*, cit., p. 661 ff; DORDI, C. "La liberalizzazione dei servizi professionali e l'assetto normativo italiano" e SACERDOTI, G., "L'Accordo Generale sugli scambi di servizi (GATS): dal quadro OMC all'attuazione interna", in SACERDOTI, G., VENTURINI, G., (Eds.) *La liberalizzazione multilaterale dei servizi e i suoi riflessi per l'Italia*, Milano, Giuffrè, 1997, at pp. 61 ff and pp. 2 ff, and recently, ESPOSITO, C. D., "International Trade and National Legal Orders: The Problem of Direct Applicability of WTO Law", cit., *infra*, pp. 429 ff.

Commission and by the Council seen as the only efficient means of assuring the Community of reciprocity in the implementation of the agreements and equal respect to the execution of obligations by its counterparts. "The only thing that is left," it was noted, was to assure "negative equality of internal enforcement" ⁽⁶⁹⁾; and it was done by invoking a pretended similar interpretation of the condition of reciprocity upheld by the Court of Justice of the European Communities in its *Kupferberg* decision ⁽⁷⁰⁾.

The impact of the Commission's attitude gives cause for careful, critical analysis. Though perhaps not wholly unexpected, it may create an avalanche effect, leading to widespread mirror legislation reflecting US laws and statutes. Certainly the Commission's objective was ultimately the same as the objective of the entire WTO integrated system: the promotion of fair relations among the contracting parties. Two observations, however, may be made regarding the position it had assumed:

a) In spite of what it had affirmed, the Commission could not have taken comfort in the Court of Justice's decision in the *Kupferberg* case.

b) Mirror legislation was not, in fact, the only available option, nor was it usually considered a means of guaranteeing protection of the principle of reciprocity to the Community.

17. *The Kupferberg case.*

In *Kupferberg*, the Court was requested by the Bundesfinanzhof pursuant to Art. 177 of the EC Treaty to interpret Article 21(1) of the EEC-Portugal Association Agreement of July 22, 1972, according to which: "the contracting parties [committed themselves] to refrain from any measures or practice of an internal nature establishing, whether directly or indirectly, discrimination between the

(69) KUYPER, P.J., "The New WTO Dispute Settlement System: The Impact on the Community," in BOURGEOIS, J.H., BERROD, F., GIPPINI FOURNIER, E., (Eds.) *The Uruguay Round Results - A European Lawyers' Perspective*, cit., pp. 87 ff. at p. 106.

(70) *Hauptzollamt Mainz v. C.A. Kupferberg & Cie*, case 104/81, [1982] ECR 3641.

products of one contracting party and like products originating in the territory of the other contracting party”.

The Bundesfinanzhof requested the Court of Justice to establish whether this provision was directly applicable law and conferred rights upon EC Member States' citizens.

The governments of Germany, Denmark, France and the UK intervened in the proceeding. They observed that, even admitting the Community nature of the provisions of the agreements concluded by the European Community, “the generally recognized criteria for determining the effects of provisions of a free trade agreement of a purely Community origin may not be applied to provisions concluded by the Community with a non-member country.” They further maintained that the direct applicability of these provisions had to be determined on the basis of, *inter alia*, “the principle of reciprocity governing the application of free trade agreements.”

The Court of Justice, in its decision, shared the view that “the effects within the Community of provisions of an agreement concluded by the Community with a non-member country may not be determined without taking account of the international origin of the provisions in question [and of] the general rules of international law.” The Court, however, did not state that no attention should be paid to the question whether the courts of the treaty partner would be prepared to give such direct effect. Rather, it more subtly stated: “the fact that the courts of one of the other parties consider that certain stipulations in the agreement are of direct applicability whereas the courts of the other party do not recognize such direct effect is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement.”

With this clarification, the Court unequivocally admitted that *a)* reciprocity works and *b)* indicated the method to be followed for its application. The Court stated that, in subordinating the recognition of the direct applicability of a Community provision to the observance of reciprocity, regard had to be given not only to the fact that the courts of the third States bound by this agreement do not recognize such direct application, “but also, more broadly, to the overall behaviour of these States.” In this way it made clear that what is relevant is “substantial reciprocity”. It did so because

“although each contracting party is responsible for executing fully the commitments which it has undertaken, it is nevertheless free to determine the legal means for attaining that end in its legal system.”

For the Court, according to the general rules of international law there must be *bona fide* performance of every agreement. Therefore a violation of the reciprocity principle does not lie by the fact, in and of itself, that the courts of a third State party to a Community agreement do not recognize its direct application, but rather, by the fact that such non-recognition of direct applicability eventually contributes to a finding that a State's behaviour is inconsistent with the *bona fide* principle (71).

18. *The principle of reciprocity.*

Once the real meaning of the Court of Justice's case law has been ascertained, it cannot be argued that the recital included in the text of the decision is the only thing that is left. What is left is to ensure equality between the parties in respect of international enforcement and to avoid placing some States in a more favorable position that would be fundamentally unfair to their trading partners: the possibility for the European Community's and Member States' institutions to apply the reciprocity principle in accordance with the method indicated by the Court of Justice.

Automatic observance of what was laid out in a recital of the preamble of the decision 94/800, denying direct applicability to Marrakech law, would mean abstaining from verifying case by case, if, in effect, the reciprocity principle was being respected in the relations between the Community and its partners in the enforcement of commitments undertaken, rather than following the criteria indicated by the Court. Moreover, its automatic observance would

(71) For analogous weakening of the rigid application of the reciprocity principle within the context of private international law, see MINGOZZI, P., “*La condizione di reciprocità ed il diritto internazionale privato*”, in *Rivista di diritto internazionale privato e processuale*, 1994; with reference to the European Community, see ECKOUT, P., *The European Internal Market and International Trade: A Legal Analysis*, Clarendon Press, Oxford, 1994 at p. 50.

conflict with the character which the Community system has assumed throughout its development as a result of its progressive evolution as a legal system, strongly influenced by the notion of respect for the rule of law and typically destined to directly protect the physical and legal persons acting in the Member States, including those who are actively participating in international trade ⁽⁷²⁾. It may be maintained that, having acquired this character, Community law established the right of individuals, acting within the Community territory, to have access to courts (to Member States' courts and to the Court of Justice) and assert before them subjective legal claims capable of being derived from Community and international acts to which the Community gave legal effect.

In Opinion 1/91 ⁽⁷³⁾, the Court of Justice held as inconsistent with the EC judicial system the conclusion of an international agreement creating a separate judicial system, destined to guarantee the respect of such agreement, whenever its implementation might weaken (i.e. "create" uncertainty) the role that Article 164 of the EC Treaty assigns to the Court of Justice to ensure the respect of Community law. The Court of Justice considers this inconsistency insurmountable even if using the EEC Treaty's Article 236 revision procedure (today replaced by Article N of the TEU).

Now, what the Court has expressly stated with reference to an agreement capable of weakening the functioning of the EC judicial system is all the more valid with reference to the Council decision approving the Marrakech agreements. This decision, in fact, in the field covered by those agreements, goes far beyond weakening the EC judicial system. It aims at completely neutralizing the protection of the rights eventually provided for by the agreements to the citizens and other subjects operating in the European Union.

Asserting that the direct applicability of Marrakech law cannot

(72) On the features of the evolution that has characterized the European Community law and on the protection of individuals as the pillars of the EC legal system, see MENGOTZI, P., *Il diritto comunitario e dell' Unione europea*, Cedam, Padova, 1997, p. 278 ff. and ID., "Corte di Giustizia, giudici nazionali e tutela dei diritti attribuiti ai cittadini dal diritto comunitario", in *Contratto e Impresa*, 1993, p. 1179 ff.

(73) Opinion 1/91 [1991] ECR I-6079.

be excluded *a priori* by the decision through which the Community has adopted the Uruguay Round results does not mean that the Community and Member States' judges must apply the Marrakech provisions every time they might be directly applicable according to the criteria which determine the direct applicability of laws spontaneously created within Community law.

The Court of Justice, it is worth repeating, pointed out in the *Kupferberg* case that "the effects within the Community of provisions of an agreement concluded by the Community with a non-member country may not be determined without taking account of the international origin of the provisions in question [and of] general rules of international law".

It follows that the judges of Member States along with the Court of First Instance and the Court of Justice of the European Communities will be compelled to take into account the principle of international law, surely compatible with Marrakech law, which states: *inadimplenti non est adimplendum*.

A clear confirmation of this can be found in the 4th recital of the preamble to the Council's Regulation No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the EC ⁽⁷⁴⁾ as amended by Regulation No. 2331/96 of 2 December 1996 ⁽⁷⁵⁾ that was adopted in order to implement the 1994 Anti-Dumping Agreement. It states that "in applying the rules it is essential, in order to maintain the balance of rights and obligations which the GATT Agreement established, that the Community take account of how they are interpreted by the Community's major trading partners." This principle, though concerning anti-dumping and expressed only with reference to the problems of interpreting Community antidumping rules implementing the Community's international commitments, cannot be brushed aside when facing problems that go beyond interpretation matters of the Mar-

(74) OJEC L56/1 of 6 March 1996.

(75) OJEC L317/1 of 6 December 1996. On the EC anti-dumping law, see MULLER, W., KHAN, N., NEUMANN, H.A., *EC Anti-Dumping Law - A Commentary on Regulation 384/96*, John Wiley & Sons, Chichester, New York, Winheim, Brisbane, Singapore, Toronto, 1998.

rakech agreements. It will also impose itself on situations of substantial violation by third States, especially by the Community's major trading partners. When facing these situations, the judges operating in the Community must apply Marrakech law, keeping in mind, besides the possible intrinsic direct applicability of each provision and chapter, the practice constituted by their implementation or non-implementation by third States. This will inevitably induce them to deem their concrete judicial applicability subject not only to the condition that they are sufficiently clear, precise and unconditional, but also to the condition of *substantial reciprocity* between the Community and the third State. This condition will not be considered fulfilled if the third State does not concretely implement those agreements ⁽⁷⁶⁾.

The need to verify the existence of this second condition may be problematic for the EC judges and, particularly to the EC Member State judges. But, as always, *adducere inconveniens non est indicare remedium*. This problem may be managed in a timely manner in light of the institutional cooperation existing between the EC Court of Justice and the EC Commission, and on the basis of the general principle of cooperation between the judges of the Member States and the Community's institutions which was emphasized by the

(76) Recently, in case C-53/96 (*Hermès International v. FHT Marketing Choice BV*), Advocate General Tesauro had to take position on the possible direct effect of Art. 50 of the TRIPS Agreement relating to the discipline that national authorities must apply in matters of protection of intellectual property. In his conclusions presented on 13 November 1997, he overcame what was expressly stated in the preamble to decision 94/800 regarding denial of direct applicability of the agreement by upholding what the Court of Justice had ruled in *Kupferberg*. The Advocate General stressed that the judges have to evaluate the substance of the requirement of reciprocity, and maintained that the respect of an agreement can result from stands other than recognition of the direct applicability of its provisions; according to Advocate General Tesauro, if an agreement is respected *via* means other than recognition of its direct applicability, there is not lack of reciprocity. (For a confirmation of this stand see TESAURO, G., "I rapporti tra la Comunità europea e l'OMC", in *Scritti in onore di Giuseppe Federico Mancini*, Vol. II, *Diritto dell'Unione europea*, Giuffrè, Milano, 1998, pp. 951 ff., at p. 988). Unfortunately, in its judgement of 16 June 1998 (not yet reported), the Court skipped the issue.

Court of Justice in the *Simmenthal* case ⁽⁷⁷⁾ and recently articulated in the matter of competition in a Communication by the Commission on the application of Articles 85 and 86 of the EC Treaty ⁽⁷⁸⁾. It is within the framework of such cooperation, for example, that Member State judges will be promptly informed by the Commission of the actual implementation in the United States of the conventions signed in Marrakech, beyond the clause excluding their direct applicability before its own courts. This application may derive from a practical approach by the administration, influenced by the parliamentary and corporate control mechanisms which monitor agreements concluded by that country.

19. *Conditions for the direct applicability of an agreement: content of the provisions themselves and of the national system in which the agreement is to be implemented.*

To the two observations discussed in the preceding paragraphs, a third less specific but more structural factor may be added: the direct applicability of the provisions of an international agreement before judges and other bodies of the contracting parties depends, on the one hand, on the features of the provisions of the agreement and, on the other hand, on the content of the national system in which is made appeal to them ⁽⁷⁹⁾.

Regarding the features of the provisions, the non-direct applicability of certain provisions asserted by each of the contracting parties to the agreement does not exclude the direct applicability of others. The fact that in the GATS Agreement the principle of national treatment is not presented as being directly applicable but instead operates only in reference to those services which are listed

(77) *Amministrazione delle Finanze v. Simmenthal S.p.a.*, case 106/77, [1978] ECR 328.

(78) OJEC 1993 C39/6.

(79) For more on this, see MORELLI, G., *Nozioni di diritto internazionale*, Cedam, Padova, 1963, pp. 90 ff. Similarly, with specific reference to international trade agreements, see JACKSON, J.H., *Restructuring the GATT System*, The Royal Institute of International Affairs, Council on Foreign Relations Press, New York, 1990, pp. 31 ff.

by each Member in its schedule does not exclude the direct applicability of other provisions. For example, most favored nation treatment, contained in Article II.1 GATS, expressly states that “[w]ith respect to any measure covered by this Agreement, each Member shall accord *immediately and unconditionally* to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country” ⁽⁸⁰⁾.

Regarding the content of the national system in which appeal is made to the conventional provisions, certain WTO rules — for example Art. VI.2.(a) GATS and Art. X.3.(b) GATT 1994 — expressly refer to the fact that the direct applicability of a conventional rule may depend on the internal order of a contracting party. Article VI.2.(a) GATS provides: “[e]ach Member shall maintain or institute *as soon as practicable* ⁽⁸¹⁾ judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services.” And Article X.3.(b) GATT 1994 provides: “[e]ach contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedure for the purposes, *inter alia*, of the prompt review and correction of administrative action relating to customs matters.” These rules expressly contemplate the duty of WTO Members to set up legal instruments to which “an affected service supplier” or an “importer” may appeal, which implies the potential direct applicability of GATS and GATT. However, the proviso that the maintenance or institution of mechanisms of judicial review occur “as soon as practicable” indicates that direct applicability is not necessarily the only means for enforcing GATS commitments. It must be understood as aiming to permit WTO Members who have a tradition of guaranteeing the implementation of international trade agreements through other non-judicial means to maintain, at least for the moment, that tradition. This does not mean, however, that

(80) Emphasis added.

(81) Emphasis added.

WTO Members (such as the EC and European Community Member States) may back down from a tradition that they eventually have to ensure a complete and effective jurisdictional protection of the advantages likely to be derived by private operators from the exercise of powers (82).

So far, the Court of Justice, with respect to some GATT 1947 (83) rules and the Anti-Dumping Code of 1979 (84), has affirmed that it will verify the legitimacy of a Community act in light of the GATT only a) in cases where the Community has made clear by that act the intentions to carry out a particular obligation undertaken in the ambit of the GATT, and b) in the case where that Community act expressly refers to specific provisions in the General Agreement (85). Beyond these cases, the Court has consistently held that the great flexibility of GATT 1947's provisions -particularly regarding the possibility to derogate, the exceptions in cases of exceptional hardship, and the dispute procedures- have impeded it from considering the agreement to be directly applicable. This is not the case with WTO law. Since its entry into force, derogation and exceptions are subject to strict substantive and procedural rules. Two examples of this rigidity can be found in the Agreement on Safeguards and in the DSU. Furthermore, as already seen, the wording of many provisions is clear, precise and unconditional, as in Article II.1 GATS, or the TRIPS agreement whose preamble emphasizes that "intellectual property rights are private rights" (86). There is, then, a series of rules which can imply the direct applicability of WTO rules: provisions dedicated to the administration of the trade rules, which require that the WTO Members prepare adequate mechanisms of review of decisions adopted by national

(82) See MINGOZZI, P., "Le GATS: un accord sans importance pour la Communauté européenne?" in RMUE, 1997/2, pp. 19 ff.

(83) See the leading case *International Fruit Company*, decision of December 12, 1972, joined cases 21-24/72 [1972] ECR 1219.

(84) *Nakajima*, decision of May 7, 1991, case C-69/89, [1991] ECR I-2069.

(85) See *Germany v. EU Council*, case C-280/93, [1994] ECR I-4973, par. 111.

(86) Regarding the possibility of considering TRIPS to be directly applicable, see EINHORN, T., "The Impact of TRIPS (Trade-Related Aspects of Intellectual Property Rights) on EC Law: A Challenge to Regionalism", cit., *infra*, pp. 568-573.

authorities in matters falling within the frame of the Marrakech Agreements ⁽⁸⁷⁾.

20. DSU provisions for the surveillance of implementation.

As discussed above (par. 5), one weakness in the WTO system lies in the possibility for unilateral withdrawal on relatively short notice. This factor constitutes a manifestation of the continued operation of the classic international law principle of State sovereignty. This principle was invoked throughout the life of GATT 1947, particularly by the United States, under the doctrine of "fall back." Now, with the work of the panels and Appellate Body under the new system achieving wider acceptance, the risk of a return to this doctrine is reduced.

One other factor is worth noting here: the DSU, in addition to the mandatory nature of reports which are adopted, provides for a procedure of surveillance of implementation of recommendations and rulings adopted by the DSB. Art. 21 DSU, after emphasizing that "prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members," requires that the losing party inform the DSB, at a meeting to be held within 30 days after the adoption of the panel or Appellate Body report, of its intentions regarding the implementation of those recommendations and rulings.

Article 21 further establishes that where "it is *impracticable* to comply immediately with the recommendations and rulings, the Member concerned shall have a *reasonable period of time* in which to do so" ⁽⁸⁸⁾. The subsequent part of this provision is devoted to the definition of "a reasonable period of time." It shall be:

"a) the period of time proposed by the Member concerned,

(87) Other than Art. IV.4.(a) of GATS, and Art. X.3.(b) of GATT 1994, noted above, see Art. 13 of the Anti-Dumping Agreement, Art. 23 of the Subsidies Agreement, Art. 4 of the Agreement of Preshipment Inspection, Art. 41 of the TRIPS Agreement. On these provisions, see ESPOSITO, C. D., "*International Trade and National Legal Orders: The Problem of Direct Applicability of WTO Law*", cit., *infra*, pp. 443-448.

(88) Art. 21 DSU, par. 3, emphasis added.

provided that such a period is approved by the DSB, or in the absence of such approval.

b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,

c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings ⁽⁸⁹⁾. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.”

Once it has been established, by mutual consent or through binding arbitration, how DSB recommendations or rulings are to be complied with and the period of time in which to do so, the DSB has the duty of surveillance of the implementation:

“The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB’s agenda until the issue is resolved. At least 10 days prior to each such meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.”

The surveillance mechanism described in Art. 21 DSU has proved efficient so far, not only where immediate compliance with DSB recommendations and rulings is impossible and the parties to the dispute have agreed a “reasonable period of time”, but as well as when the assistance of an arbitrator has been required. To date, the

(89) The text of art. 21 DSU inserts here a footnote which clarifies that “[i]f the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.”

arbitrators, who have defined the reasonable period of time in light of the object and purpose of the DSU as "the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB" ⁽⁹⁰⁾, have never deviated from the 15 month guideline directly contemplated by the DSU ⁽⁹¹⁾; and in the only case where that period has already expired, the *Japan - Taxes on Alcoholic Beverages* case ⁽⁹²⁾, the losing party has respected it. Undoubtedly, the rigid procedural requirements established for the successive stage of the adoption of WTO panel and Appellate Body reports serves as a valid means to pressure the members concerned to respect within the established time limits its WTO obligations.

21. *Conclusions.*

I hope that the preceding paragraphs have served to illustrate the utility of analyzing WTO law problems in the light of its implementation practice.

From a mere examination of the texts, the new system may appear unstable, subject to the risk of collapse because of the possibility for withdrawal upon short notice provided for in Article XV of the WTO. The analysis of practice has demonstrated, however, how this risk has been greatly decreased by the application of rules in the matter of consultations and the functioning of the DSB, with the balanced results achieved therein. In fact this well-equilibrated Dispute Settlement System has reinforced the efficacy of the consultations procedure through the warning that, should consultations fail, either party to a dispute may independently bring the dispute to a binding third party body for a ruling. At the same time, the "judicial" procedure benefits from the fact that only

(90) *EC Measures Concerning Meat and Meat Products (Hormones)*, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes of 29 May 1998, WT/DS29/15, WT/DS48/13, par. III.4.

(91) See the *WTO Overview of the States of Play of WTO Disputes* of 29 May 1998, Section I, devoted to the "Implementation Status of Adopted Reports."

(92) WT/DS8, WT/DS10, WT/DS11.

questions already raised in consultations procedures — where they have been clearly defined — may be submitted.

On the other hand, the system has been shown to have significantly, though obviously not entirely, responded to its own instabilities as a result of the check exercised by the Appellate Body over panel case law. Though limited in its competence due to the ability to rule only on points of law, thanks to the emphasis placed on practical experience in the selection of its members the Appellate Body is succeeding in tempering the purely mercantilist appearance of the WTO rules, leaving room for an application which takes into consideration other rules to which WTO rules must be reconciled.

What reported above regarding the delicate interpretation that the Appellate Body has made of Art. XX GATT 1994, regarding factors to be accounted for when conducting the risk-assessment provided for in the SPS Agreement, and regarding the affirmation of the necessity to apply international trade rules in harmony with a principle of active cooperation, is indeed a significant contribution to the achievement of an auspicious objective in the broader environment of the international community: the objective of moving away from an international law of coexistence and towards an international law of cooperation. In any case, hopes can be raised that the continued evolution of international trade law, thanks to the WTO, will not sacrifice other non-commercial imperatives, but rather will actively promote their satisfaction.

II.

THE SETTLEMENT OF DISPUTES IN THE WTO SYSTEM

JAVIER FERNÁNDEZ PONS

SELF-HELP AND THE WORLD TRADE ORGANIZATION

SUMMARY: Introduction. — 1. "Suspension" as the last resort provided by the DSU to the Member invoking dispute settlement procedures. — 1.1. Special regime of reaction to violations of WTO law established by the DSU and its relationship with the rules of general international law on countermeasures. — 1.1.1. The precedent: coercive enforcement of the law in the GATT 1947 practice. — 1.1.2. Coercive enforcement of the WTO law as synthesis between the acknowledgement of a "right to countermeasures" and its submission to a special regime of guarantees. — 1.2. The operability of the "suspension" in complaints not founded on an infraction of the covered agreements. — 2. "Suspension" as a countermeasure against a prior violation of an international rule outside the WTO law. — 3. "Suspension" as a unilateral measure taken with the intention of affirming a law *in statu nascendi*. — Concluding remarks.

Introduction.

The lack of any central authority in international society means that international legal order is characterized by the decentralization of the three typical functions of all juridical order (creation, verification and coercive enforcement of the law). The resulting limitations of such decentralization can be mitigated through institutionalizing cooperation between States. In this sense, the establishment of the World Trade Organization (WTO) and, particularly, of its system for settling disputes among its Members represents a recent manifestation of the aforementioned process of institutionalizing international relationships.

Now, and as underlined by René-Jean DUPUY, progressive verticalization of international relationships operated in the framework of International Organizations has not overcome the horizontal structure of States' juxtaposition which forms the grounds of inter-

national society and, therefore, this "relational structure" and the new "institutional structures" coexist dialectically and are mutually conditioned ⁽¹⁾.

The purpose of this study consists of examining how this dialectical relationship is present in the WTO framework, showing in what way general international law rules linked to the "relational structure" can condition the operating of an institutional framework such as the WTO.

This broad objective can be bound through the analysis of such a relationship regarding one of the most characteristic elements of a decentralized society: self-help. In fact, as Gaetano ARANGIO-RUIZ, Special Rapporteur of the International Law Commission (ILC) on State responsibility, indicates: "[...] in a predominantly inorganic society, in which individual States and groups of States must place so much reliance on the unilateral protection of their rights, the concept of self-help ultimately characterizes the whole range of inter-State relations" ⁽²⁾.

The concept of self-help is also characterized by its width, due to which the ILC rejected its use in the Draft articles on State

(1) *Communauté internationale et disparités de développement. Cours général de droit international public*, RCADI, t. 165 (1979-IV), pp. 9-232, see especially Chapter I (p. 46 and ff.), in which the models of the "droit relationnel" and of the "droit institutionnel" are described and Chapter II (p. 67 and ff.) dedicated to the examination of the "affrontements dialectiques des deux modèles". Analogous pronouncements are expressed by Antonio CASSESE, *International Law in a Divided World*, Clarendon Press, Oxford, 1986, pp. 30-31 ("[...] in the international community two different patterns in law, one traditional, the other modern, live side by side. The new legal institutions [...] have not uprooted or supplanted the old framework; rather, they appear to have been superimposed on it (even though their main purpose is to attenuate the most conspicuous deficiencies of the old one)") and by Juan-Antonio CARRILLO SALCEDO, *Droit international et souveraineté des États. Cours général de droit international public*, RCADI, t. 257, 1996, pp. 35-221, at p. 215 ("[...] deux types de sociétés internationales et de droit international — les modèles traditionnel et institutionnel — coexistent aujourd'hui en interaction sans que, pour autant nous puissions croire qu'il s'agisse d'étapes historiques successives dont la dernière représente un dépassement ou un déplacement de la précédente").

(2) *Third report on State responsibility by Mr. Gaetano ARANGIO-RUIZ, Special Rapporteur*, doc. A/CN.4/440, 19 July 1991, para. 12, reproduced in *YILC*, 1991, vol. II (Part One), p. 9.

responsibility ⁽³⁾, but it is useful for the purposes of this study because, precisely thanks to its generic nature, it enables covering very diverse kinds of the States' resorts to unilateral measures, without detriment to their specific qualification, including likewise those cases in which the resort to such measures is not presented as an injured State's reaction to a prior violation of any international rule, but rather as a means to protect its interests or to promote a change in the existing rules ⁽⁴⁾.

In accordance with the purpose of the present study, the self-help phenomenon will be of interest when this could involve a suspension of the application of obligations derived from WTO agreements regarding a Member. So, three kinds of suspension of the application of such obligations, to which herein we shall refer simply under the generic term of "suspension", will be analyzed:

1) "Suspension" as the last resort provided by the *Dispute Settlement Understanding* (DSU) for the Member invoking its dispute settlement procedures, regarding coercive enforcement of the panels/Appellate Body reports adopted by the Dispute Settlement Body (DSB), distinguishing the cases of claims founded on violations ("violation complaints") of the so-called "claims without infraction" ("non-violation complaints" and "situation complaints");

2) "Suspension" applied as a countermeasure against a prior

(3) *Ibid.*. See also the reference of D. BOWETT to the convenience of avoiding in the corresponding ILC works "the generic term 'self-help'" in *YILC*, 1992, vol. I, p. 81, para. 41.

(4) In this way, the International Court of Justice (ICJ) has verified that on certain occasions the conduct of a State incompatible with a given norm is presented as "indications of the recognition of a new rule", considering that the "reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law" ("Military and Paramilitary Activities in Nicaragua and against Nicaragua", Judgement of 27 June 1986, *ICJ Reports* 1986, p. 98, paras. 186 and p. 99, para. 207). This phenomenon, whose paradigmatic example would be the Proclamation of the United States President Truman of 28 September 1945 concerning the continental shelf, has been qualified by Prosper WEIL as a "dialectique subtile, qui fait de la violation d'aujourd'hui le germe de la règle de demain" (*Le droit international en quête de son identité - Cours général de droit international public*, RCADI, t. 237, 1992, VI, pp. 9-369, at p. 168).

violation of an international rule not covered under the WTO law; and

3) "Suspension" as a unilateral measure taken with the intention of affirming a law *in statu nascendi*.

Before developing the three aforementioned cases of "suspension" it is first necessary to specify that, since the object of this research consists of examining the incidence of international general rules on self-help in the WTO law, this study will not be analyzing certain cases qualified by the WTO special rule agreement as "suspension" as their operation depends on the peculiarities of these concrete rules and they are instruments whose particular nature is defined by the agreements ⁽⁵⁾.

1. *"Suspension" as the last resort provided by the DSU to the Member invoking dispute settlement procedures.*

The DSU Art. 3, entitled "General Provisions", establishes in the last sentence of its paragraph 7 that: "[...] The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the applica-

(5) So, for example, in application of the dispositions as regards safeguards measures, like the contemplated by GATT Art. XIX ("Emergency Action on Imports of Particular Products") and in the specific agreement that develops it, a Member will be able to "suspend" the execution of certain obligations in the particular situations provided in such dispositions. A "suspension" of the application of some of the obligations imposed by the WTO law could also result of the concession by the Ministerial Conference of a "waiver" to the Member that is in exceptional circumstances (Art. IX:3 of the WTO agreement). On the other hand, certain authors have considered the adoption of anti-dumping tariffs and countervailing duties of subventions as a resort to measures that would be in fact "très proches dans leur mise en oeuvre des représailles classiques" (see Eric CANAL-FORGUES, *L'institution de la conciliation dans le cadre du GATT - Contribution à l'étude de la structuration d'un mécanisme de règlement des différends*, Établissements Émile Bruylant, 1993, pp. 222-223). Against this assimilation of those instruments to the countermeasures, BOISSON DE CHAZOURNES underlines that such measures of commercial defence are configured like the exercise of some rights contemplated by the treaties in the face of the harmful effects of certain practices and they are not founded on the will of reacting against a particular action of a State so soon (*Les contre-mesures en droit international économique*, Pedone, Paris, 1992, p. 71, nt. 10).

tion of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures”.

This “last resort”, whose discipline is contained in DSU Art. 22, dedicated to the “Compensation and the Suspension of Concessions”, is at the disposal of the Member whose complaint has been assumed in the report of a *panel* or, in due course, of the Appellate Body (reports on whose adoption the DSB will proceed according to the so-called new rule of the “negative consensus” ⁽⁶⁾) or, if the case were to arise, by the award resulting from the arbitration provided by DSU Art. 25 ⁽⁷⁾, before the recalcitrant Member which, after the reasonable period of time acknowledged to it has expired ⁽⁸⁾, has not implemented the pertinent recommendations or rulings or with which it has been impossible to reach a mutually acceptable compensation within 20 days as from the date of expiry of the implementation term ⁽⁹⁾.

According to the pertinent provisions of the covered agreements, DSU procedures can be filed equally via claims regarding their infraction (“violation complaints”) as via claims not founded on any infraction (according to the models of the “non-violation complaints” and of the “situation complaints” described in sections (b) and (c) of Para. 1 of Art. XXIII of GATT 1994, whose expression upholds the pertinent provisions of the GATT 1947). Keeping in mind that the DSU establishes notable specialities in the procedures relating to complaints not founded on infractions of the covered agreements as detailed in its Art. 26 ⁽¹⁰⁾, it is convenient to

(6) See DSU Arts. 16 (“Adoption of Panel Reports”) Paras. 4 and 17, Para. 4 (“Adoption of Appellate Body reports”).

(7) The quoted article configures the arbitration as “an alternative means of dispute settlement” and “subject to mutual agreement of the parties” (Paras. 1 and 2) and it remits the issues concerning the surveillance of implementation and the remedies in the face of non-compliance of the awards to the corresponding provisions established for the panel/Appellate Body reports (Para. 4).

(8) Through the diverse procedures contemplated in DSU Art. 21, Para. 3.

(9) See DSU Art. 22, Para. 2. In Para. 1 of this article it is specified that compensation “is voluntary and, if granted, shall be consistent with the covered agreements”.

(10) Whose two paragraphs are dedicated, respectively, to the “Non-

treat the operability of "suspension" as "the last resort" in both kinds of disputes separately.

It is necessary to point out that the operability of the remedy in question in violation complaints will deserve special attention since, as was already verified in the GATT 1947 practice and beyond the diverse kinds of complaints foreseen, most disputes tend to be formulated in terms of violations of the covered agreements ⁽¹¹⁾.

Before examining each case, it is indispensable to refer to DSU Art. 23, entitled "Strengthening of the Multilateral System" ⁽¹²⁾. If in the face of the weaknesses of the GATT 1947 dispute settlement

Violation Complaints of the Type Described in Paragraph 1 (b) of Article XXIII of GATT 1994" and to the "Complaints of the Type Described in Paragraph 1(c) of Article XXIII of GATT 1994".

(11) As it is underlined by Ernst-Ulrich PETERSMANN, under Art. XXIII:1 of GATT, "less than 20 out of a total of more than 250 dispute settlement proceedings since 1948 also raised 'non violation complaints'" (*The GATT/WTO Dispute Settlement System - International Law, International Organizations and Dispute Settlement*, Kluwer Law International, London - The Hague - Boston, 1997, p. 136).

(12) According to DSU Art. 23:

"1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:

(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreement has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel of Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;

(b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and

(c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations, under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time."

system, the necessity to resort to unilateral measures were invoked, essentially by the U.S., to ensure respect of the substantive multilateral rules ⁽¹³⁾, giving rise above all as from mid eighties to the phenomenon qualified as “aggressive unilateralism” ⁽¹⁴⁾; the aforementioned DSU Art. 23 assumes the fact that, once the multilateral procedures are duly strengthened, “enforcement” of the WTO law is not a function that could be exercised unilaterally on the grounds of any Member’s particular viewpoints, hence avoiding the risk of arbitrariness and abuse involved in such unilateral remedies ⁽¹⁵⁾.

(13) Principally, through imposing commercial “penalties” in applying Section 301 of the US Trade Law of 1974, subsequently object of different reforms and expansion of its content (such as that effected through the Omnibus trade and Competitiveness Act of 1988) and currently coded in 19 USC §§ 2411-2420 (1994), an instrument which was conceived to fight against protectionism and to achieve the opening of foreign markets and to which later references on this study will be made. In this sense, in 1989 President BUSH asserted: “the Uruguay Round of the GATT continues to be the centrepiece of our trade strategy. While the lack of effective multilateral rules and enforcement mechanisms has forced us to resort to Section 301, we look forward to the day when such actions will be unnecessary” (Statement by the President, Office of the White House Press Secretary, Release Announcing Super 301 (May 26, 1989)).

(14) See Jagdish BHAGWATI, *Aggressive unilateralism: an overview*, in J. BHAGWATI - H.T. PATRICK (eds.), *Aggressive unilateralism - America's 301 trade policy and the world trading system*, The University of Michigan Press, Ann Arbor, 1990, pp. 1-45; Fusae NARA, *A shift toward protectionism under S. 301 of the 1974 Trade Act: problems of unilateral trade retaliation under international law*, *Hofstra L. R.*, vol. 19, 1990, pp. 229-267. Among the authors that defended the growing resort to unilateralism see, for example: Warren MARUYAMA, *Section 301 and the appearance of unilateralism*, *Mich. J. Int'l L.*, vol. 11, 1990, pp. 394-402; Alan O. SYKES, “Mandatory” retaliation for breach of trade agreements: some thoughts on the strategic design of Section 301, *Boston U. Int'l L.J.*, vol. 8, 1990, pp. 301-324, for whom “until trading nations establish bilateral and multilateral dispute-resolution mechanisms with the power to issue definitive legal interpretation and to enforce compliance subsequently, unilateral action will at times afford the only hope of controlling abuses under GATT and other agreements affecting commerce” (at p. 324).

(15) Thus, Christian SCHEDE describes the content of Art. 23 of DSU as the establishment of the “WTO monopoly” in determining the “treaty obligations”, of the “time-frame for implementing DSB recommendations” and in the “authorization of the suspension of obligations” (*The strengthening of the multilateral system: Article 23 of the WTO Dispute Settlement Understanding: dismantling unilateral retaliation under Section 301 of the 1974 Trade Act?*, *W. Comp.*, vol. 20, n. 1, 1996, pp. 109-138, at pp. 120-121).

Art. 23 of the DSU, in regard to the diverse kinds of disputes that can be raised according to the corresponding provisions of the covered agreements, determines the exclusivity of the DSU procedures, limiting the principle of free choice of means ⁽¹⁶⁾ and excluding the possibility of any Member qualifying the facts for itself. This provision assumes, in the WTO institutional framework, the centralization of the juridical function consisting of the verification or declaration of the law (through the panels/Appellate Body adopting reports or the alternative resort to arbitration according to the DSU rules). This situation is in contrast to the self-qualification with which each State proceeds in the framework of general international law, manifestation of the relativism deriving from the sovereign equality of the States and summarized by the non-existence of any mandatory jurisdiction of a general nature.

On the other hand, letter (c) of the aforementioned DSU Art. 23, taking the prior "institutional" declaration about the claims of the parties as a premise in the controversy and being in charge of the remedies provided for the coercive enforcement of that declaration, limits the invocable nature of general international law rules on self-help and establishes, like the referred-to Para. 7 of DSU Art. 3, the need for prior authorization from the DSB in order to proceed to a suspension of concessions or other obligations as a reaction against the recalcitrant Member and it explicitly explains the submission of that "suspension" to the remaining substantive and procedural conditions provided by the DSU.

The following epigraphs will be devoted to analyzing the relationship between the regulation of this DSU "last resort" and general international law rules on self-help, dealing first of all with the case of violations complaints and, later, with complaints not based on an infraction.

(16) According to Ernst-Ulrich PETERSMANN, "the compulsory jurisdiction and mandatory nature of WTO panel proceedings [...] further limit the applicability of the general international principles for the settlement of disputes, such as the principles of the "free choice of means" (cf. Article 33 of the UN Charter)" (*op. cit.*, p. 182).

1.1. *Special regime of reaction to violations of WTO law established by the DSU and its relationship with the rules of general international law on countermeasures.*

In cases of violation of the WTO, it is necessary to indicate that the possible "suspension of concessions or other obligations" against a recalcitrant Member is considered a manifestation of general international law rules on countermeasures ⁽¹⁷⁾, a juridical institution to which the Draft's articles on State responsibility provisionally adopted by the ILC on its first reading in 1996 ⁽¹⁸⁾ dedicate Chapter III of Part Two regarding "Content, forms and degrees of international responsibility", treating it as one of the consequences arising from a State having committed an internationally wrongful act ⁽¹⁹⁾.

(17) In this sense, it is outstanding that Agreement on subsidies and countervailing measures uses in its Art. 7, dedicated to "Remedies", the expression "[...] the DSB shall grant authorization to the complaining Member to take countermeasures". The mentioned juridical foundation is explicited, *inter alia*, by: Pierre PESCATORE, *Drafting and analyzing decisions on dispute settlement*, in P. PESCATORE - W. J. DAVEY - A. F. LOWENFELD, *Handbook of WTO/GATT Dispute Settlement*, Transnational Publishers, Inc., Irvington-on-Hudson, New York, 1991, Supplemented annually (release n. 7, June 1996), Vol. 1, Part two, pp. 3-40, at p. 31, nt. 51, who considers that terms like "suspension of concessions" are "[...] a diplomatic euphemism which means in fact retaliation"; Andrea COMBA, *Il neo liberismo internazionale — Strutture giuridiche a dimensione mondiale dagli Accordi di Bretton Woods all'Organizzazione Mondiale del Commercio*, Giuffrè, Milano, 1995, p. 167, where reference is made to the general principles of the self-help and reciprocity, and particularly to the principle *inadimplenti non est adimplendum*, codified in Art. 60 of the Vienna Convention on the law of treaties; Pieter-Jan KUYPER, *The New WTO Dispute Settlement System: the impact on the European Community*, in J.H.J BOURGEOIS - F. BERROD - E. GIPPINI FOURNIER (eds.), *The Uruguay Round Results - A European Perspective*, College of Europe (Bruges), European Interuniversity Press, Brussels, 1995, pp. 87-114, at p. 104; Aldo LIGUSTRO, *Le controversie tra Stati nel diritto del commercio internazionale: dal GATT all'OMC*, CEDAM, Padova, 1996, p. 607, who considers them as countermeasures included in the field of the principle *indimplenti non est inadimplendum*; John H. JACKSON, *Appraising the Launch and Functioning of the WTO*, *GYIL*, vol. 39, 1996, pp. 20-41, that regards that "last resort" as "retaliation measures" (at p. 33); Miquel MONTANA MORA, *La OMC y el reforzamiento del sistema del GATT - Una nueva era en la solución de diferencias comerciales*, McGraw-Hill, Madrid, 1997, p. 144.

(18) See the *Report of the International Law Commission on the work of its forty-eighth session*, 6 May-26 July 1996, doc. A/51/10, Chapter III, Section D, pp. 125-151.

(19) Draft Art. 47, with which opens the quoted Chapter devoted to "Coun-

Without prejudice of that last foundation in the legal institution of countermeasures, the DSU provisions regulating the "suspension of concessions or other obligations", as soon as they set specific limits to the possible reaction against a prior violation of the WTO law, are an expression of the particular discipline of the legal consequences arising from a wrongful act settled down by the Marrakech agreements.

Indeed, these are not limited to establishing a set of substantive "primary" rules but rather they accompany them with a series of "secondary" rules regarding the consequences of their violation. For this reason they represent a practical example of the possibility of the quoted Draft articles on State responsibility of the ILC contemplated in its Art. 36, entitled "*Lex specialis*", according to which the general rules in the matter "[...] do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act" (20).

Such "subsystems", characterized by the fact that they do not merely formulate basic rules but rather also establish special rules

termeasures", establishes in its first paragraph that: "For the purposes of the present articles, the taking of countermeasures means that an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act in order to induce it to comply with its obligations under articles 41 to 46 [regarding the "Cessation of wrongful conduct" and the "Reparation" and its diverse forms], as long as it has not complied with those obligations and as necessary in the light of its response to the demands of the injured State that it do so". The ILC specifies in its general commentary on the Chapter at issue that "countermeasures take the form of conduct, not involving the use or threat of force, which — if not justified as a response to a breach of the rights of the injured State — would be unlawful as against the State which is subject to them" and they are different of the acts of retort, "[...] which, although they may be seen as "unfriendly", are not actually unlawful", underlying that the wrongfulness of acts constituting countermeasures is excluded by the own Draft that in its Art. 30, that refers to the "Countermeasures in respect of an internationally wrongful act" as one of the "Circumstances precluding wrongfulness" (*ibid.*, p. 153).

(20) The text of this draft article coincides, essentially, with the wording of Art. 2 of Part Two of the Draft approved provisionally by the Commission in 1983, although in this one the non-derogation nature of *jus cogens* rules and the priority of the UN Charter were explicitated (see its commentary in *YILC*, 1983, vol. II, Part Two, pp. 42-43).

on the consequences of their violations, have been qualified under the concept of “self-contained regimes” ⁽²¹⁾, a notion that Bruno SIMMA restricts by reserving it “[...] to designate a certain category of subsystems, namely those embracing, in principle, a full (exhaustive and definite) set of secondary rules” ⁽²²⁾.

Regarding the countermeasures, a remedy that the ILC itself has qualified as “rudimentary” for the abuses and ulterior reactions that may easily derive from them ⁽²³⁾, the establishment of such special regimes — developed mainly in the framework of International Organizations — has been directed generally to limiting or even excluding their operability. Hence, one of the cases most frequently mentioned as an example of *self-contained regime* is the European Community, whose Court of Justice has excluded the possibility of resorting to countermeasures in the *ad intra* relationships between its Member States ⁽²⁴⁾.

(21) Concept that the ICJ used in its Judgement on the case “United States Diplomatic and Consular Staff in Teheran”, noting that the eventual abuse by the members of a diplomatic mission of their privileges and immunities could not justify their ulterior taking as hostages because “[...] diplomatic law itself provides the necessary means of defence against, and sanction for, [such] illicit activities”, reminding that “[...] diplomatic law, in short, constitutes a self-contained regime which [...] specifies the means at the disposal of the receiving State to counter any such abuse” (Judgement of 24 May 1980, *ICJ Reports 1980*, pp. 38 and 40). In the mentioned ILC works on State responsibility there are multiple references to the “self-contained regimes” that, as will be detailed later on, are centred on the issue of the limits of that concept, examining the cases in which, beyond the special rules, the general rules on the consequences arising from an internationally wrongful act are still applicable (see, especially, the Third Report of Willem RIPHAGEN (doc. A/CN.4/354, 12-Mar-82, para. 54 reproduced in *YILC*, 1982, Vol. II, Part One, p. 30 and the Third and Fourth Reports of Gaetano ARANGIO-RUIZ (docs. A/CN.4/440, *loc. cit.*, paras. 84-88 and A/CN.4/444, 12-May-92, paras. 97-126, reproduced in *YILC*, 1992, pp. 35-42).

(22) *Self-contained regimes*, *NYIL*, vol. XVI, 1985, pp. 111-136, at p. 117.

(23) *Loc. cit.*, pp. 153-154.

(24) Cf., for example, the case 332/78 (*Commission of the EC v. French Republic*, “Mutton and Lamb”, Judgement of 25 September 1979, *ECJ Reports*, 1979-8, p. 2739), in which the Court affirmed that: “A Member State cannot under any circumstances unilaterally adopt, on its own authority, corrective measures or measures to protect trade designed to prevent any failure on the part of another Member State to comply with the rules laid down by the Treaty”. Other cases in relation to which it has been stayed their possible qualification as *self-contained*

The existence of such "subsystems" sets the problem of determining whether, in certain cases, the rules of general international law on countermeasures continue being invocable. Without detriment to more attentively examining the question in relation to the concrete WTO law, it may be advanced that the idea that the so-called "self-contained regimes" are not configured like completely closed "legal circuits" is well shared, as is the idea that neither do they exclude the general rules on countermeasures on a permanent basis. In this sense, according to the so-called "fall-back" doctrine, once the inefficacy of special remedies has been verified, those general rules can be invoked anew ⁽²⁵⁾.

Keeping in mind the outlined considerations, we shall now try to

regimes are the cases providing specific mechanisms for the protection of the human rights (like the International Covenant on Civil and Political Rights of 1966 and the European Convention on Protection of Human Rights of 1950), the diplomatic law and the very GATT 1947 itself (cf. the diverse opinions maintained by the doctrine detailed in the Fourth Report of Gaetano ARANGIO-RUIZ, *loc. cit.*, paras. 101-112).

(25) Cf. the references to that fall-back doctrine as much in the ILC works (see specially the Third Report of Willem RIPHAGEN (*loc. cit.*, para. 54, "[...] the subsystem itself as a whole may fail in which case a fall-back on another subsystem may be unavoidable [...] the more organized system prevails until it fails as such") and the Fourth Report of Gaetano ARANGIO-RUIZ (*loc. cit.*, paras. 114-116 and its discussion in *YILC*, 1992, Vol. 1, p. 139) as in: Bruno SIMMA, *loc. cit.*, p. 136 ("[...] by establishing "self-contained regimes", States contract out of the general rules on the consequences of treaty violations on the expectation that these regimes will work to their mutual benefit. If the balance thus foreseen appears to them to be later destroyed, the principles of *inadimplenti non est adimplendum* or the clause of *rebus sic stantibus* will work as strong rationales for a fall-back to the general regime"; Denis ALLAND, *Justice privée et ordre juridique international - Étude théorique des contre-mesures en droit international public*, Pedone, Paris, 1994, p. 291 ("tout système de réglementation des conséquences spécifiques de l'illicite ne résiste au jeu des contre-mesures qu' autant qu' il est lui-même respecté et efficace", in this manner the "fall-back" doctrine implies that the special provisions of the "[...] régimes se suffisant à eux mêmes [...] ont pour effet d'écarter provisoirement (si elles échouent) ou définitivement (si elles s'avèrent efficaces) le recours aux contre-mesures". See other critical approaches to the sought closed character of certain special regimes in: Elisabeth ZOLLER, *Peacetime unilateral remedies: an analysis on countermeasures*, Transnational Publishers, Dobbs Feery, New York, 1984, pp. 83-93; Ricardo PISILLO MAZZESCHI, *Risoluzione e sospensione dei trattati per inadempimento*, Giuffrè, Milano, 1984, pp. 309-310; Karl ZEMANEK - Jean SALMON, *Responsabilité internationale*, Pedone, Paris, 1987, pp. 64-65 and 86-87.

examine to what extent the WTO law limits the operability of the general rules on countermeasures. Any such examination requires prior reference to the provisions and practice of the GATT 1947 in this issue, indispensable in assessing the novelties introduced by the new mechanism.

1.1.1. *The precedent: coercive enforcement of the law in the GATT 1947 practice.*

The GATT 1947 provisions on dispute settlement foresaw drastic limitations of the customary law right on countermeasures. Hence, according to its Art. XXIII:2, a contracting party could suspend the application of its concessions or other obligations regarding a defaulting party only after its complaint had been sustained by the CONTRACTING PARTIES and counting on their previous authorization ⁽²⁶⁾.

The drafting history of the quoted article, in the framework of the preparatory works of the Havana Charter, shows that in the projected and finally *non nata* International Trade Organization (ITO) there was a will for a coercive enforcement of the law not be governed by the operating of general international law rules on countermeasures, but rather subjected to a strict institutional control to impede unilateral resort to self-help measures and possible abuses giving rise to an onset of "trade wars" like that observed before World War II ⁽²⁷⁾.

(26) The wording of GATT 1947 Art. XXIII:2 established that: "If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time [...] the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate [...] If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances [...]"

(27) In this sense, the drafter Clair WILCOX manifested that they were introducing: "[...] a new principle in international economic relations. We have

The authoritative powers attributed to the CONTRACTING PARTIES, drawn up in terms of broad discretion, made the commented suspension depend on a political decision for the approval of which, according to the literal wording of the General Agreement, a majority of the votes cast was required. However, the practice followed in the decision-making process of the GATT 1947 meant that this authorization was subject to the consensus of all the contracting parties, including that of the defaulting party which could block the adoption of sanctions ⁽²⁸⁾. As a matter of fact, only one authorization of this kind was ever approved, in a case that arose in the fifties' ⁽²⁹⁾.

In this way, and without prejudice to the notable degree of spontaneous execution of its rules ⁽³⁰⁾, GATT 1947 was configured as a special regime that excluded the resort to the countermeasures

asked the nations of the world to confer upon an international organization the right to limit their power to retaliate. We have sought to tame retaliation, to discipline it, to keep it within bounds. By subjecting it to the restraints of international control, we have endeavoured to check its spread and growth, to convert it from a weapon of economic warfare to an instrument of international order" (*Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment* (Geneva, April-October 1947), Commission A, verbatim reports, doc. EPCT/A/PV/6, p. 4. The quoted affirmation was evoked in 1989 by the GATT General Director during a Council meeting devoted to the issue of the unilateral measures (see WTO SECRETARIAT, *Analytical Index: Guide to GATT Law and Practice*, updated 6th edition, Geneva, 1995, vol. 2, p. 692 [hereinafter *Analytical Index*]).

(28) On the origins of the consensus technique and its formal recognition as a customary practice in the GATT 1947 see Mary E. FOOTER, *The Role of Consensus in GATT/WT() Decision-making*, *Nw. J. Int'l. L. & Bus.*, vol. 17, 1996-97, pp. 653-680, especially pp. 658-672.

(29) In 1952, under Article XXIII:2, the Netherlands was permitted to impose a discriminatory quota for the import of US wheat flour, in response to US restrictions on the import of dairy products. This authorization was created for several years, until 1959, but, in fact, the Netherlands never exercised the authorized limit, which could mostly affect the Dutch farmers themselves. In this case the consensus practice was not yet consolidated and both disputants decided to abstain in the voting (see GATT doc. SR.7/16, pp. 4-5 and BISD 1S/31-33 and 62-64).

(30) Cf., in this sense: Robert HUDEC, *The GATT Legal System and World Trade Diplomacy*, 2nd edition, Butterworth Legal Publishers, Salem, New Hampshire, 1990, p. 192 (stressing that the GATT 1947 "[...] is not a legal system which relies on the economic sanction as a coercitive force" and the relevant role of the diplomatic pressure); Eric CANAL-FORGUES, *op. cit.*, p. 230 (underlining the impor-

and that was lacking in collective sanctions. So, it has been affirmed that it developed a "model of non-coercive system" ⁽³¹⁾.

It must be pointed out, nevertheless, that the provisions of GATT 1947 Art. XXIII:2 regarding the authorization of a suspension of concessions or other obligations did not fall into complete disuse as, on several occasions, they were invoked by the complaining party against a recalcitrant defendant party and, although the authorization at issue was blocked, its mere invocation seems to have been useful in resolving important disputes ⁽³²⁾.

On the other hand, it has been observed that the contracting parties used other instruments provided in the General Agreement, such as safeguards measures, not to serve their specific purposes (for example, to overcome certain exceptional situations of emergency), but rather to fulfil the characteristic function of the countermeasures, conceiving them as reactions against a prior wrongful act ⁽³³⁾.

tance of the "[...] pression morale ou psychologique que sont susceptibles d'exercer les Parties contractantes").

(31) See Rudolf OSTRIHANSKY, *Settlement of Interstate Trade Disputes - The Role of Law and Legal Procedures*, NYIL, vol. XXII, 1991, pp. 163-214, at pp. 176 and 213.

(32) For example, in connection with the follow-up of the 1987 Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances" which was adopted in June 1987 (BISD 34S/136), on 28 September 1989 Canada requested the authority of the CONTRACTING PARTIES to suspend the application to the US of concessions equivalent to the economic injury due to the failure of the US to comply with the conclusions of the panel report. The EC joined the request. The US blocked both requests (see C/M/236, 237 (meetings of 11 October and 7 November 1989)), but in December 1989 the US Congress amended the Superfund legislation to equalize the tax on imported and domestic products (see SR.45/2 (meeting of 4 December 1989)). See the references to the case quoted and other cases of the GATT 1947 practice in which the authorization at issue was requested in: Robert HUDEC, *Enforcing international trade law: The evolution of the modern GATT legal system*, Butterworth Legal Publishers, Salem, New Hampshire, 1993, pp. 536-537; Norio KOMURO, *The WTO dispute settlement mechanism - Coverage and procedures of the WTO Understanding*, JWT, 1995, vol. 29, 4, 1995, pp. 5-95, at pp. 34-35; *Analytical Index*, vol. 2, pp. 690-700.

(33) Cf. Robert HUDEC, *The GATT legal system...*, cit. pp. 1989-199, who recalls, as an example of the use of such "alternative forms of retaliation", that in 1974 the US, in response to Canadian "escape clause" quotas on beef, invoked its

To the ends of the present analysis it is interesting to highlight another series of cases in which an attempt was made to protect substantive rights arising from the GATT 1947 by applying commercial countermeasures without the prior authorization exacted by its Art. XXIII:2 and without looking for "legal coverage" under other special rules ⁽³⁴⁾.

The application of such countermeasures seems to respond, in some cases, to the commented "fall-back" doctrine, by virtue of which the invocation of general international law rules on countermeasures would be justified when the blockage or inefficacy of the special remedies were substantiated.

So, certain cases in which the US imposed countermeasures applying the provisions of the aforementioned Section 301 of its Trade Act were shown as an answer to the losing party's non-compliance with the findings reached by a panel and adopting its report, and its persistent refusal to authorize countermeasures ⁽³⁵⁾ or as a reaction against the defendant party's blocking any of the previous phases of the dispute settlement procedures, impeding, for

rights under Article XIX:3 to impose compensatory quotas, but under the US domestic law, the measures were considered as "[...] retaliatory measures [...] based on a finding that the Canadian quotas were in violation of GATT".

(34) Regarding such cases it has been indicated that "[...] there is no way of knowing how many contracting parties may have had recourse to self-help in withdrawing concessions or obligations outside the framework of Article XIII" (G. WHITE, *Legal consequences of wrongful acts in international economic law*, NYIL, vol. XVI, 1985, pp. 137-173, at p. 158).

(35) For instance, on 14 July 1992 the US requested the Council to authorize the suspension of concessions with respect to Canada according to Article XXIII:2 of GATT, invoking the non-fulfillment of the Panel Report findings on "Canada — Import, distribution and sale of certain alcoholic drinks by provincial marketing agencies" (DS17/R, 16-Oct-91, adopted by the GATT Council on 18-Feb-92). The Canadian representative was against such authorization and warned the US that "[...] retaliation without authorization of the CONTRACTING PARTIES was clearly contrary to GATT obligations" (C/M/258, p. 24). The US representative responded that the Canadian reasoning led to a dead end alley and he invoked, implicitly, the fall-back doctrine (*ibid.* pp. 25-26). On 24 July 1992 the US imposed a surtax of 50 per cent *ad valorem* on imports of beer brewed or bottled in Ontario as a retaliation measure (see *Analytical Index*, pp. 694-695 and 57 Fed. Reg. 33,747 (1992), Office of the US Trade Representative, *Section 301 Table of Cases* (July 1995) at 301-80 [hereinafter *Section 301 Case Log*].

instance, the panel's report being adopted by the GATT Council ⁽³⁶⁾.

Sometimes, the ulterior reaction of the targeted parties consisted, in turn, of adopting countermeasures without the corresponding authorization, invoking general international law and giving rise to notorious "trade wars" ⁽³⁷⁾.

In order to value the transcendence of the "fall-back" in the GATT 1947 practice, special mention should be given to the case of the so-called "hormones dispute" between the US and the EC. This evidenced the limitations of the pre-WTO system on dispute settlement, but when it was raised again under the DSU provisions, it proved — as will be seen — the virtues of the new mechanism. The origin of this controversy, that now we shall only examine in terms of pre-WTO events, was the EEC ban on the import and sale of animals and of meat derived from animals that had been administered any of six kinds of hormones for growth promotion purposes ⁽³⁸⁾. In March 1987, the US raised the issue of the EC ban under the Tokyo Round Agreement on Technical Barriers to Trade

(36) So, on 6 July 1985 the US, after the EEC had blocked the adoption of the Panel Report on "EEC - Tariff treatment of citrus products from certain Mediterranean countries" (L/5776, 7-2-85, non-adopted), increased drastically the duties on imports of pasta from the EEC (40% *ad valorem* on pasta without egg and 25% on pasta with egg) (see 50 Fed. Reg. 26,143 (1985) and other references in: Robert HUDEC, *Enforcing...*, cit., pp. 504-505; A. LYNNE PUCKETT - William L. REYNOLDS, *Rules, sanctions and enforcement under Section 301: at odds with the WTO?*, *AJIL*, vol. 90, 1996, pp. 675-689, at p. 682).

(37) Such a situation arose, for example, in the cases detailed in the two precedent footnotes. In this way, against the US unilateral measures, Canada stated that "it would not stand in the way of a properly constituted decision of the Council on suspension of concessions" (see DS17/7, 27-July-92) and imposed a surtax of 50 per cent *ad valorem* on imports of beer brewed by two US companies (the surtaxes were removed by both sides upon the signing of a mutually agreed solution on 5 August 1993, see *Analytical Index*, p. 695, footnote 246) and the EEC retaliated by raising duties on lemons and walnuts imported from the US (a solution was finally reached in November 1986 (see BNA, 3 ITR 1024 (1986) and other references in: J.K. BENTIL, *Attempts to liberalize international trade in agriculture in view of the problem of external aspects of the Common Agriculture Policy of the European Economic Community, Case Western Reserve J. Int'l L.*, vol. 17, 1985, pp. 335-387; Robert HUDEC, *Enforcing...*, cit., pp. 161 and 504-505).

(38) Cf. EC Council Directives 81/602/EEC, 85/659/EEC (that was annulled by the ECJ on procedural grounds) 88/146/EEC and 88/229/EEC. Later on,

("TBT Agreement") arguing that the EC Directive was a non-tariff barrier not supported by scientific information. Throughout 1988, the US and the EC held extensive talks to resolve the dispute but there was no agreement on certain substantive and procedural issues, and the procedure was blocked and unresolved ⁽³⁹⁾.

When the EC ban came into force on 1 January 1989, the US adopted countermeasures in the form of 100 per cent *ad valorem* duties on a list of products imported from the EC. In this case the EC did not introduce, as on other occasions, any "counter-retaliatory" measures, but raised a complaint arguing that the measures taken unilaterally by the US were inconsistent with the GATT 1947, and asked for the setup of a panel ⁽⁴⁰⁾. This request was blocked by the US, whose countermeasures were not fully withdrawn until 1996, then under the new WTO framework.

The attitudes upheld by the US and the EC in the "hormones dispute" reflect two diverse positions about the applicability of the "fall-back" doctrine in the previous GATT 1947 system: while the US assumed it, considering that they were lawful in applying countermeasures based on general international law after that their request under the TBT Agreement was blocked, the EC understood that the blockage of the special remedies, resulting from the demand of consensus for their function, was an integral element of a closed system that did not permit, in any event, the invocation of general remedies ⁽⁴¹⁾.

the EC Council approved the Directive 96/22/EC, the three quoted Directives, which extends the prohibition and increases the penalties and sanctions.

(39) See the US complaint and the block of the procedure in Standards Code docs. TBT/Spec/18, 9-Mar-87 and TBT/M/Spec/8, meeting of 16-Sep-87. On the dispute see: Adrián R. HALPERN, *The US-EC hormone beef controversy and the Standards Code: implications for the application of health regulations to agricultural trade*, N.C.J. Int'l L. & Com. Reg., vol. 14, 1989, pp. 135-155; Michael B. FROMAN, *The United States-European Community hormone treated beef conflict*, Harv. Int'l L.J., vol. 30, 1989, pp. 549-556.

(40) See the EEC complaint "US - Increase in duty on certain products from the European Community" in L/6438, 28-Nov-88, quoted in *Analytical Index*, p. 784.

(41) As P. J. KUYPER observed, *The law of GATT as a special field of international law - Ignorance, further refinement or self-contained system of international law?*, NYIL, vol. XXV, 1994, pp. 227-257, at p. 251.

Both attitudes entailed advantages and disadvantages. Hence, while the former could give rise to possible abuse and favour the stronger party endowed with aggressive trade policy instruments, the latter really entailed the impossibility of applying countermeasures inside or outside the special regime, limiting the coercive nature of its rules.

As there is no report of a panel's examination of the invocation of the "fall-back" doctrine (a panel that was only able to pronounce itself in the light of the specific GATT law, the so-called "four corners" of GATT, according to its "terms of reference" anyway) it is necessary to underline the diverse opinions maintained by scholars ⁽⁴²⁾.

The GATT 1947 practice would appear to confirm that the parties, at least those with the power to defend their interests unilaterally, perceived the "fall-back" doctrine as a source to legiti-

(42) Among the favourable opinions one can quote Pierre PESCATORE, for whom the GATT 1947: "[...] excludes in principle unilateral action, but this is true only if the multilateral system is not obstructed [...] if the multilateral system is not allowed to function, or, more precisely, if in a contentious process the defendant prevents consensus being attained, unilateral action becomes legitimate, as a last resort under general international law, this is surely the one point where general international law intervenes forcefully and inescapably in the GATT system" (*The GATT dispute settlement mechanism - Its present situations and its prospects*, JWT, vol. 27, n. 1, 1993, pp. 5-20, at p. 15. See other favourable opinions in: J.-G. CASTEL, *The Uruguay Round and the improvements to the GATT dispute settlement rules and procedures*, ICLQ, vol. 38, n. 4, 1989, pp. 835-849, at p. 842; Robert HUDEC, *Thinking about the New Section 301: beyond good and evil*, in J. BHAGWATI - H.T. PATRICK (eds.), *Aggressive unilateralism...*, cit., pp. 113-159, at p. 121; Daniel G. PARTAN, *Retaliation in United States and European Community trade law*, B.U.Int'l L.J., vol. 8, 1990, pp. 333-349, at p. 343; Michael J. HAHN, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht; Bd. 122, Berlin - Heidelberg - New York, 1996, p. 153 and following, and 397.

Against the "fall-back" doctrine there is the opinion of Ernst-Ulrich PETERSMANN, for whom the blockage of the special remedies should not be solved through countermeasures based on general international law, but claiming the application of majority rule in the decision-making process of the GATT 1947, as provided by the wording of the General Agreement and overcoming the consensus practice (see *The dispute settlement system of the World Trade Organization and the evolution of GATT dispute settlement system since 1948*, CML Rev., vol. 31, n. 6, 1994, pp. 1157-1244, at p. 1185 and *The GATT/WTO dispute...*, cit., pp. 82-83). Laurence BOISSON DE CHAZOURNES, *op. cit.*, pp. 183-184, neither admits the mentioned doctrine.

mate their actions. So, it was observed that when a party had a panel report in its favour it felt itself particularly authorized to apply countermeasures without prior authorization from the CONTRACTING PARTIES, thereby recovering its autonomy and not coming up against any effective reactions within the institutional framework ⁽⁴³⁾.

In short, the parallel operating of countermeasures applied on the fringe of the special rules typified the effective function of GATT 1947 and conditioned the Uruguay Round negotiations decisively, thus determining the current regime of coercive enforcement of the law in the WTO.

1.1.2. *Coercive enforcement of the WTO law as synthesis between the acknowledgement of a "right to countermeasures" and its submission to a special regime of guarantees.*

The regulation of the remedies for the coercive enforcement of the law was one of the more controversial topics in the Uruguay Round negotiations on the new dispute settlement procedures. While some parties were in favour of the automatic recognition of the possibility to resort to countermeasures after verifying the losing party's non-fulfillment of the findings contained in the report adopted as the dispute arrangement ⁽⁴⁴⁾, others sustained that mandatory authorization by the CONTRACTING PARTIES (now of the DSB) should be maintained and not be conceived as a mere formal step but rather as a true exercise of political discretion ⁽⁴⁵⁾.

(43) See, in this sense: Paolo MENGOZZI, *Il diritto della Comunità europea*, CEDAM, Padova, 1990, p. 407; Rudolf OSTRIANSKY, *op. cit.*, p. 178; Aldo LIGUSTRO, *op. cit.* pp. 277-278.

(44) In this sense, the US criticised that, in the existent procedures, any contracting party could block the authorization of countermeasures, and sustained the necessity "to remedy this problem", formulating the proposal of attributing to the "winning" party an "automatic right to retaliation if the other party failed to comply with deadlines for implementation" (doc. MTN.GNG/NG13/W/40, 6-Apr-90, p. 7). This approach was shared by Canada (doc. MTN.GNG/NG13/W/41, 28-Jun-90, p. 5) and Mexico (doc. MTN.GNG/NG13/W/42, 12-Jul-90, p. 5).

(45) Among the proposals defending the maintenance of a strict institutional control of the law enforcement there is the EC one (see *Statement by the Spokes-*

The commitment reflected in the DSU is based, first of all, on the commented exigency to obtain the DSB authorization before suspending concessions or other obligations, and on the provision that this decision is to be taken by virtue of the new "negative consensus" rule. The application of this rule, which also governs the DSB decisions regarding the establishment of panels and the adoption of panels/Appellate Body reports, has involved the turnaround of the traditional function of the consensus.

Therefore, granting the complaining party authorization to apply countermeasures against the recalcitrant injuring party is almost automatic and this will only be blocked if a "negative consensus" of all the WTO Members, including the disputants, is reached. This situation leaves the final decision in the hands of the claimant whose complaint has been corroborated and, in the same way in which "right to the panel" is acknowledged, today it can be affirmed that the WTO regime recognizes Members' a "right to countermeasures" (46).

This situation contrasts with the regime established in the GATT 1947, as much with the General Agreement wording, subjecting such "suspension" to the majority vote of the CONTRACTING PARTIES and consequently to their political discretion, as with the customary exigency of a "positive consensus". Indeed, this entailed the exclusion of the possibility of imposing countermeasures "within" the special regime and that motivated the pretence of justifying such measures "outside" the system if the special remedies failed, applying the mentioned "fall-back" doctrine.

Now, despite the WTO's own special rules acknowledging a

man of the EC, doc. MTN.GNG/NG13/W/39, 5-Apr-90, p. 2). About the diverse approaches maintained during the negotiation, see: *Note by the GATT Secretariat*, doc. MTN.GNG/NG13/21, 19-Jul-90; Terence P. STEWART (ed.) *The GATT Uruguay Round. A negotiation History (1986-1992)*, vol. II, *Commentary*, Kluwer Law and Taxation Publishers, Deventer, 1993, pp. 2769-2770; Christian SCHEDE, *op. cit.*, pp. 112-115.

(46) See P.T.B. KOHONA, *Dispute Resolution under the World Trade Organization - An overview*, *JWT*, vol. 28, n. 2, 1994, pp. 23-47, at p. 42, indicating the recognition in the WTO of a "right to a retaliation" and Aldo LIGUSTRO, *op. cit.*, p. 547, that considers this true and proper right to countermeasures as one of the principal elements of rupture regarding the previous system of the GATT 1947.

"right to countermeasures", they also declare that this can only be exercised as a last resort. Therefore, there is a certain consecration or "codification" of the "fall-back" doctrine by the WTO law, a phenomenon already present in other treaty-based subsystems ⁽⁴⁷⁾. The countermeasures, which in the previous regime appeared as an alien remedy linked to pathological situations, have become a structural element of the new system and characteristic of its physiologic functioning, without detriment to its application as the *ultima ratio*.

In this way, the WTO law has been set apart from those regimes, like the EC law, whose special rules exclude self-help in the relationships *ad intra* between their Members, and it seems closer to other regimes like the North American Free Trade Agreement (NAFTA) or the Common Market of the South (MERCOSUR) in which the coercive nature of the system is based on the acknowledgement of a "right to countermeasures" ⁽⁴⁸⁾.

(47) A "codification" of the "fall-back" doctrine takes place, for example, according to Willem RIPHAGEN, in the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (*UNTS*, vol. 575, p. 159), since when its special procedures are ineffective (because the receiving State does not fulfill the award) it "revives" the possibility of "diplomatic protection", a remedy characteristic of general international law (see his quoted Third Report (Doc. A/CN.4/353, 12-Mar-82), para. 54, footnote 38). Another example could be found, according to Bruno SIMMA (*op. cit.*, p. 125, footnote 59), in the Treaty Establishing the European Coal and Steel Community (ECSC), whose Article 88, Para. 3 (providing the possibility that, if a Member State does not fulfill its obligations, the Commission in accordance with a verdict of the Council by a majority of two thirds will be able to impose penalties or to authorize the other Member States to adopt countermeasures) "incorporates an element of self-help" and is "understood by the dominant view in Community law doctrine as a "fall-back" into general international law".

(48) Under Article 2019 of NAFTA, that came in force on 1 January 1994, if parties cannot agree on a mutually satisfactory resolution within thirty days of receiving the panel's final report, the complaining party may suspend the application to the party complained against of benefits of equivalent effect until such time as they have reached agreement on a resolution to the dispute. This retaliation is unilateral and does not require any prior notification, intervention or authorization. In the case of a "manifestly excessive" retaliation by the winning party, the losing party may request arbitration (see Gabrielle MARCEAU, *NAFTA and WTO dispute settlement rules - A thematic Comparison*, *JWT*, vol. 31, n. 2, 1997, pp. 25-81, especially pp. 33 and 69-70). Regarding MERCOSUR, the dispute resolution system, governed by the Protocol of Brasilia of 1991, came in force on 23 March

The DSU provisions granting the resort to countermeasures and that configure this as a very real possibility ⁽⁴⁹⁾ have been considered a partial legalization or “internationalization” of the application of unilateral measures by virtue of domestic instruments directed to the defence of trade interests, like Section 301 of the US Trade Act ⁽⁵⁰⁾. Hence, while in the previous system the requirement of “positive consensus” to authorize countermeasures did in fact mean that these measures emerged as illegal in the light of the GATT 1947 special rules raising the necessity to justify them according to general international law, in the new system such measures and the internal provisions governing them emerge — whenever the DSU procedures are respected — as true instruments at the service of the WTO law and directed to regulate the application of the remedies granted by the DSU in internal legal orders.

Even so, in contrast to what happens, for example, in EC law whose commercial defence instruments are typified by the explicit reference to the necessity to strictly respect international obligations and procedures ⁽⁵¹⁾, the US instruments — despite being applicable

1993 and provides that if a party does not fulfill with the pertinent award in a term of 30 days, the other disputant parties can adopt compensatory measures (Art. 23), a circumstance that, as Heber ARBUET VIGNALI notes, implies a resort to forms of enforcement and penalty that are characteristic of public international law (*La solución de controversias en el Mercosur - Un aspecto esencial aun por resolver*, in Manuel RAMA-MONTALDO (general ed.), *El derecho internacional en un mundo en transformación - Liber amicorum en homenaje al Profesor Eduardo JIMÉNEZ DE ARÉCHAGA*, Fundación de cultura universitaria, Montevideo, 1994, pp. 1229-1261, at p. 1255).

(49) See Pieter-Jan KUYPER, *The New WTO Dispute...*, cit., p. 93 and Claudio COCUZZA - Andrea FORABOSCO, *Il sistema di risoluzione delle controversie commerciali tra Stati dopo l'Uruguay Round del GATT*, *Dir. Comm. Int.*, vol. 10.1, 1996, pp. 139-164, at p. 158.

(50) See about the so-called “internationalization” of Section 301 in: Judith H. BELLO - Alan F. HOLMER, *GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301?*, *Int'l Law.*, vol. 26, 1992, pp. 795-802; ID., *The post-Uruguay Round Future of Section 301*, *Law & Pol'y Int'l Bus.*, vol. 25, n. 4, 1994, pp. 1297-1309; Christian SCHEDE, *op. cit.*, p. 136.

(51) See the Council Regulation (EC) n. 3286/94 of 22-Dec-1994, laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJEC 1994 L 349/71, 31-Dec-1994), especially Art. 1 (“Aims”) and

in full conformity with the DSU — continue to allow the competent authorities to act unilaterally, suspending the application of trade concessions or other obligations, either before DSB authorization, or even in the face of a panel or Appellate Body decision against the US ⁽⁵²⁾.

Such a situation raises the problem about whether or not the mere fact that internal rules like the Section 301 are in force is an infraction of the WTO law and, particularly, of the aforementioned DSU Art. 23 and of the WTO Agreement Art. XVI:4, according to which “each Member shall ensure the conformity of its laws, regulations and administrative procedures to its obligations as provided in the annexed Agreements”. The generalized nature of the doctrine denies such an infraction, considering that this incompatibility would only arise if a domestic rule were to impose, in a mandatory sense, behaviour inconsistent with the WTO rules. This is a circumstance that does not arise in Section 301 where such behaviour is always left to the discretionary decision of the competent authorities ⁽⁵³⁾. This interpretation is based on the traditional approach

Art. 12 (“Adoption of commercial policy measures”). See also: C.W.A. TIMMERMANS, *L’Uruguay Round: sa mise en oeuvre par la Communauté européenne*, *Rev. Marché Un. Eur.*, 1994, n. 4, pp. 175-183; Pieter-Jan KUYPER, *The conclusion and implementation of the Uruguay Round Results by the European Community*, *EJIL*, vol. 6, 1995, pp. 222-244; *Id.*, *The New WTO Dispute Settlement: The Impact on the European Community*, *JWT*, vol. 29, n. 6, 1995, pp. 49-72.

(52) On the impact of the Uruguay Round Agreements Act (URAA, US implementation legislation) on Section 301, that has not introduced very substantial modifications, see: Richard. O. CUNNINGHAM - Clint N. SMITH, *Section 301 and Dispute Settlement in the World Trade Organization*, in *The World Trade Organization: the multilateral trade framework for the 21st century and US implementation legislation*, Washington, D.C., 1996, pp. 581-615; Susana HERNÁNDEZ PUENTE, *Section 301 and the new WTO Dispute Settlement Understanding*, *ILSA Journal of Int’l & Comparative Law*, 1995, vol. 2, pp. 213-234.

(53) According to Section 301 (a) (2) the US Trade Representative (USTR) is not required to take retaliatory action even in cases of “mandatory action” if, among other assumptions, the DSB determines that the foreign government practice challenged is not WTO-illegal (see 19 USC § 2411 (a) (2) (1994). See: Christian SCHEDE, *op. cit.*, p. 128, who underlines that “[...] the USTR is not mandated to act inconsistently with WTO obligations [...] Unless applied otherwise, Section 301 is not *per se* inconsistent with the US obligations under the WTO”; J.R. SILVERMAN, *Multilateral resolution over unilateral retaliation: adjudi-*

followed in the GATT 1947 to evaluate the consistency of domestic norms ⁽⁵⁴⁾ and it seems to be in conformity with the answer given by general international law ⁽⁵⁵⁾. Therefore, only those specific acts of application of the Section 301 that contravene the DSU provisions will be inconsistent with the WTO laws.

In this way, recapturing the analysis of the above-commented "hormones dispute" in the new WTO framework, it must be highlighted that, after the US raised its complaint against the EC directives prohibiting the use in livestock farming of certain substances having a hormonal action again (this time invoking, among other reasons, their inconsistency with the Sanitary and Phytosanitary Measures Agreement [SPS Agreement]) ⁽⁵⁶⁾, the EC impugned the retaliatory measures applied by the US since 1989 once again by virtue of Section 301, considering them inconsistent with GATT Articles I, II and XIII, as well as DSU Articles 3, 22 and 23, and declaring that with the application of the aforementioned Section

cating the use of Section 301 before the WTO, U. Pa. J. Int'l Econ. L., 17 (1996), pp. 233-294, especially p. 300, considering that "utilizing Section 301 in strict accordance with Article 23 and WTO dispute resolution procedures does not require further amendment, only sound application".

(54) According to panels traditional interpretation a law or regulation is contrary to GATT only if it is mandatory and as such is contrary to GATT terms, but not if the text of the law or regulation permits a GATT conformed application (see the case of law quoted in *Analytical Index*, vol. 2, pp. 645-648 and, particularly, the 1990 Panel Report on "Thailand - Restrictions on importation of and internal taxes on cigarettes", adopted on 7-Nov-90 (BISD 37/S/200, pp. 227-228). P.J. KUYPER considers that an interpretation of the exigency of the quoted exigency of the WTO Agreement Art. XVI.4 different to the traditional one would be excessively onerous for the Members" (*The New WTO...*, cit., p. 110).

(55) In this way, as Benedetto CONFORTI underlines, the violation of international rules through the simple emanation of laws or other norms of purely abstract reach cannot be jeopardized (*Diritto internazionale*, IV ed., Ed. Scientifica, Napoli, 1995, pp. 192 and 335).

(56) The US requested consultations with the EC on 26 January 1996 (WT/DS26/1) and the establishment of a panel on 25 April 1996 (WT/DS26/6). In its report that was circulated to Members on 18 August 1997 ("EC - Measures concerning meat and meat products (hormones) - Complaint by the US" WT/DS26/R/USA), the Panel found that the EC directives were inconsistent with the SPS Agreement. On 24 September 1997, the EC notified its intention to appeal against certain issues of law and legal interpretations developed by the Panel (see WTO SECRETARIAT, *Overview of the state-of-play of WTO disputes*, 26-Sep-97, p. 3.

301 "in this case", the US apparently failed to ensure the requisites of Article XVI:4 of the WTO Agreement ⁽⁵⁷⁾. Soon after, on 15 July 1996 and not in vain, the US withdrew its retaliation measures once the obstruction of the procedure concerning the "hormones directives" had been overcome, as thanks to the new rule of "negative consensus", the US could no longer allege the inefficiency of special remedies to legitimate the adoption of countermeasures, according to the "fall-back" doctrine. Subsequently, the EC decided not to pursue its own panel request ⁽⁵⁸⁾.

Without detriment to the DSU virtues in overcoming "trade wars", as evidenced in the commented dispute, in contrast to the successive blockades of the procedures and the resort to unilateral measures verified in the GATT 1947, the fact that the DSU special rules have consecrated a right to countermeasures, albeit only as last remedy, has given rise to certain criticism. Especially sour is the one formulated by M.S.P. SHUCKLA, who considers that the WTO law presents intimidating elements as the new dispute settlement system confers international legitimacy to certain unilateral reactions which, in the light of the GATT 1947 provisions and without detriment to their possible justification by virtue of the "fall-back" doctrine, appeared as an illegitimate abuse of power or unilateral intimidation ⁽⁵⁹⁾.

In the face of such criticism, it must be underlined that the DSU confronts pragmatically the dialectical tension that arose in the GATT 1947 system between a special law that formally subjected

(57) In its request for consultations, dated 17 April 1996, the EC impugned the Presidential Proclamation § 5759 of 24 December 1987 (US retaliation against the "hormones directive"). On 19 June 1996, the EC requested the establishment of a panel to examine this matter. See the references to the case "US - Tariff increases on products from the European Communities", complaint by the EC" (WT/DS39) in *ibid.*, p. 13.

(58) *Ibid.*

(59) Such criticisms, formulated in the framework of a round table on the relationships North-South, are reproduced in Erskine CHILDERS - Brian URQUHART, *Pour rénover le système des Nations Unies*, Fondation Dag Hammarskjöld, Uppsala, 1995, p. 97, footnote 168, where it is considered that the coercive enforcement of the WTO law regime will be highly unfavourable for the developing country Members.

the countermeasures to a majority decision (and that in fact did not authorize them) and general international law that was sometimes invoked to justify countermeasures taken “outside” the system.

In such a way, the DSU assumption of a “right to countermeasures” is conditioned by the setup of several limits directed towards avoiding possible abuses, with a synthesis taking place between the acknowledgement of the operability of the characteristic institute of general international law and its submission to a special regime of rules and controls.

Apart from the rules that shape the way the “right to countermeasures” is to be exercised as a last resort, commented on already, it is also necessary to examine those rules directed towards avoiding excesses in their application.

First of all, it has to be indicated that it is the complaining party itself which determines which concessions or other obligations will be suspended and the level of the suspension, a circumstance that accentuates the characterization of the “suspension” as a unilateral reaction and that distances it from the concept of “institutional punitive measures” ⁽⁶⁰⁾.

Even so, in this determination the complaining party is to apply the principles and procedures established in DSU Art. 22. Its Para. 4 provides the basic rule according to which the level of the suspension “[...] shall be equivalent to the level of the nullification or impairment”, a provision that can be considered as the concretion in the WTO law of the more generic requirement of proportionality established by general international law rules on countermeasures ⁽⁶¹⁾.

(60) On the distinction between “horizontal” reprisals and “vertical” sanctions provided for by international institutions see: Charles LEBEN, *Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société internationale*, AFDI, vol. XXVIII, 1982, pp. 9-77, at p. 19; *Third report on State responsibility* by Mr. Gaetano ARANGIO RUIZ, *loc. cit.*, para. 15.

(61) The quoted Draft articles on State responsibility of the ILC provides in its Art. 49, titled “Proportionality”, that: “Countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State”. For the commentary to the article (former article 13), see the *Report of the Commission on the work of its forty-seventh session* (doc. A/50/10, pp. 144-149). See also Daniel BARDONNET,

Likewise, although by virtue of the "single-package" principle that has inspired the negotiations of the Marrakech Agreements one could impose so-called "cross-retaliations", so that, for instance, it is possible to react against a violation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) suspending the application of concessions or other obligations arising from the General Agreement of Trade in Services (GATS), Para. 3 of DSU Art. 22 tries to preserve the "qualitative" adjustment of the countermeasures, providing that the suspension in diverse sectors of the same agreement or, ultimately, of another covered agreement, will only take place with a subsidiary nature.

In order to impede hypothetical abuses by the complaining party in the exercise of its "right to countermeasures", the DSU recognizes in turn the recalcitrant losing party's right to refer the issue unilaterally to "arbitration" whose decision shall be accepted as final by the parties concerned ⁽⁶²⁾.

Besides, according to the DSU Art. 24 concerning "Special Procedures Involving Least-Developed Country Members", when the defendant party is a least-developed country the "complaining parties shall exercise due restraint in [...] seeking authorization to suspend the application of concessions or other obligations" ⁽⁶³⁾, a factor that can mitigate certain problems arising from "size-disparities" among the WTO Members.

The DSU special rules do not envisage the suspension of concessions or other obligations as measures with a punitive character. These are "temporary measures" whose function is essentially coercive, pressing the recalcitrant party to fully implement its specific

Quelques observations sur le principe de proportionnalité en droit international, in Manuel RAMA-MONTALDO (general ed.), *op. cit.*, p. 995 and following, especially p. 1020, footnote 72, where the GATT system is qualified as one of the international frames in which it seems that "[...] la proportionnalité des mesures et des contre-mesures y soit appréciée de façon étroite et rigide".

(62) See DSU Art. 23, Pares. 6 and 7. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director General. During the course of the arbitration concessions or other obligations shall not be suspended.

(63) See DSU Art. 24, Para. 1.

obligations ⁽⁶⁴⁾. This exclusion of the punitive aspect has been considered as a factor that would substantially differentiate the DSU rules on countermeasures from general international rules on reprisals ⁽⁶⁵⁾.

It is necessary to underline, however, that the evolution of the general rules on reprisals also tends to eliminate their punitive function ⁽⁶⁶⁾. This trend can be observed in the ILC works on State responsibility where, in contrast to previous positions ⁽⁶⁷⁾, nowadays it is affirmed that: "[...] an injured State may not take measures in order to inflict punishment on the alleged lawbreaker" ⁽⁶⁸⁾. In this manner, the WTO special rules converge at this point with the progressive development of general international law.

After having described the DSU provisions for the coercive enforcement of the WTO law, it is opportune to refer to some criticisms that have been formulated about their viability and effi-

(64) See DSU Arts. 21, Paras. 1 and 22, Para. 8. It has to be specified that the DSU does not regard the reparation of the damages caused before and during the procedure, following the GATT 1947 tradition that, generally, did without a *restitutio in integrum* with an *ex tunc* effect. On the issue cf.: Pieter-Jan KUYPER, *The law of GATT...*, cit., pp. 250-251; Giorgio SACERDOTI, *La trasformazione del GATT nell'Organizzazione mondiale del commercio*, DCI, vol. 9.1, 1995, pp. 73-90, at p. 85; Aldo LIGUSTRO, *op. cit.*, p. 606; Antonio REMIRO BROTONS, *Pelagattos y aristogattos de la Comunidad Europea ante el Reino de la OMC*, GJ, Serie D-16, 1996, pp. 7-86, at p. 35, noting that the dispute regarding the reparation of damages is outside the DSU integrated system; Ernst-Ulrich PETERSMANN, *The GATT/WTO...*, cit., pp. 77-81.

(65) Cf., in this sense, Aldo LIGUSTRO, *op. cit.*, p. 608.

(66) Cf. Andrea DE GUTTRY, *Le rappresaglie non comportanti la coercizione militare nel diritto internazionale*, Giuffrè, Milano, 1985, p. 12; Linos-Alexandros SICILIANOS, *Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense*, LGDJ, Paris, 1990, pp. 50-57; Carlo FOCARELLI, *Le contromisure nel diritto internazionale*, Giuffrè, Milano, 1994, pp. 426-429, especially footnote 120;

(67) From the point of view of the Special Rapporteur Roberto AGO, the punitive purpose characterized the countermeasures, although it could be accompanied by other purposes and to also constitute a means of exerting pressure (see *Addendum to the eighth report on State responsibility*, doc. A/CN.4/318/Add.5-7, para. 90).

(68) *Report of the ILC on the work of its forty-eighth session* (6 May-26 July 1996), A/50/10, cit., p. 156. According to the Commission: "[...] the function of countermeasures may not go beyond the pursuit by the injured State of cessation and reparation. Any measures resorted to by an injured State that exceed those lawful functions or aims would constitute an unlawful act" (*ibid.*).

cacy. Scholars have referred, mainly, to the problems arising from the size-disparities among the WTO Members, highlighting the scarce power of coercion of the countermeasures applied by a small State against a world commercial power ⁽⁶⁹⁾.

The dependence of the efficacy of the countermeasures on the reaction capacity of the complaining party leads some authors to show the execution of the WTO rules in terms of political opportunity, noticing that for a world power like the US it will sometimes be more "profitable" to persist in an inconsistent declared behaviour and to assume the "costs" of the countermeasures authorized to the complaining party (or to grant it a compensation) than to act in conformity with the WTO rules ⁽⁷⁰⁾. This thesis, as John H. JACKSON has evidenced, does not respect the DSU wording ⁽⁷¹⁾ but shows the system limits in practice anyway.

In order to overcome the problems arising from size-disparities, establishing in the WTO a system of collective penalties has been suggested, as a *de lege ferenda* proposal, by way of the approval of

(69) In this sense, T.J. DILLON (Jr.) indicates graphically that in a case between a small developing country as plaintiff and a large and developed country as a respondent "retaliation may have nothing more than the effect of a mosquito biting an elephant" (*The World Trade Organization: a new legal order for world trade?*, *Mich. J. Int'l L.*, vol. 16, n. 2, 1995, pp. 350-402, at p. 400). See also Yves RENOUE, *Les mécanismes d'adoption et de mise en oeuvre du règlement des différends dans le cadre de l'OMC son-ils viables?*, *AFDI*, vol. XL, 1994, pp. 776-791.

(70) Cf. Judith H. BELLO, *The WTO Dispute Settlement Understanding: less is more*, *AJIL*, vol. 90, n. 3, 1996, pp. 416-418, who after indicating that "the WTO rules are simply not "binding" in the traditional sense" (pointing out ironically that when a panel established under DSU issues a ruling adverse to a Member "[...] there is no prospect of incarceration [...] or police enforcement"), that: "[...] the United States is not required to comply with a WTO dispute settlement ruling adverse [...] Instead, the United States (and any other member) may choose to comply, to compensate, or to stonewall and suffer retaliation against its exports".

(71) *The WTO Dispute Settlement Understanding — Misunderstandings on the nature of legal obligation*, *AJIL*, vol. 91, n. 1, 1997, pp. 60-64, where those DSU provisions are evoked (Arts. 3.7, 19.1, 21.1, 22.1, 22.8 and 26.1.b)) that in the case of violation complaints impose the obligation to bring the measure into conformity with the covered agreements, while the compensation and suspension of concessions or other obligations are not established as alternatives but rather as mere temporary measures that do not enforce ceasing the obligation of a specific execution.

countermeasures that all the Members should apply against the recalcitrant party ⁽⁷²⁾. In practice, it would be difficult to apply this proposal as it affirms the substantial rejection shown to similar initiatives formulated by some developing countries in the previous GATT 1947 system ⁽⁷³⁾.

In the face of the criticism of the weaknesses of the DSU enforcement mechanisms, it is necessary to underline that this is a common problem affecting the general nature of international judgements ⁽⁷⁴⁾ due to the lack of execution mechanisms comparable to those provided in internal legal orders ⁽⁷⁵⁾. In fact, if the WTO provisions are compared to the *mise en oeuvre* provisions of other international law fields, the high degree of formalization of the former may be substantiated ⁽⁷⁶⁾. So, it is not strange that other

(72) Cf. T.J. DILLON (Jr.), *op. cit.*, p. 400. Yves RENOUE, *op. cit.*, p. 790, also indicates such an alternative, outlining the technical and juridical difficulties of its application.

(73) On the Uruguay-Brazil plan of 1965, that included a proposal for collective retaliation as a last-resort remedy in cases of particularly damaging violations (see BISD 14S/139 and Maria M. CHING, *Evaluating the effectiveness of the GATT dispute settlement system for developing countries*, *W. Comp.*, vol. 16, n. 2, 1992, pp. 81-112). On the rejection in 1984 of a Nicaraguan suggestion to provide for general CONTRACTING PARTIES enforcement of a successful developing country challenge to a developed country infraction see Kendall W. STILES, *The new WTO regime: the victory of pragmatism*, *J. Int'l L. & Prac.*, 1995, n. 4, pp. 3-41, p. 12.

(74) See, in this sense, Antonio REMIRO BROTONS, *op. cit.*, p. 34.

(75) Cf. Gaetano MORELLI, *Soluzione pacifica delle controversie internazionali - Ciclo di lezioni*, Edizioni scientifiche italiane, Napoli, 1991, p. 49; A. TANZI, *Problems of enforcement of decisions of the International Court of Justice in the face of the law of the United Nations*, *EJIL*, vol. 6, 1995, n. 4, pp. 539-572.

(76) See DSU Art. 21, devoted to the "Surveillance of Implementation of Recommendations and Rulings", especially Para. 3 (c), regarding the binding arbitration that, ultimately, will determine the reasonable period of time to implement the recommendations and rulings of the DSU (as has happened in the case "Japan — Taxes on alcoholic beverages"; see the Award of the Arbitrator Julio Lacarte-Muró in docs. WT/DS8/15, WT/DS19/15 and WT/DS11/13, of 14-Feb-97) and Para. 6, establishing that "the DSB shall keep under surveillance the implementation of adopted recommendations or rulings" and that this issue shall remain on the DSB's agenda until it is resolved, foreseeing "at least 10 days prior to each of such report in writing of its progress" in the quoted implementation. See also Art. 22, Para. 8, providing that "the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including

scholars praise the DSU remedies ⁽⁷⁷⁾ and that others even end up outlining their excessively constrictive character ⁽⁷⁸⁾.

Having valued the DSU remedies directed towards the implementation of adopted recommendations or rulings, a query must be raised about whether there is an ulterior possibility of invoking the "fall-back" doctrine in the WTO regime. In short, it has to be determined whether, when the WTO special remedies are ineffective against a recalcitrant Member, it would be possible to adopt countermeasures based on the pure application of general international law.

Before examining the answers given to this question, it must be specified that the question at issue has lost a great part of the practical importance that it once had in the previous GATT 1947 system. So, as the new rule of "negative consensus" impedes the blockage of procedures and grants, and — as a last resort — a right to countermeasures "within" the system, the disjunctive is no longer located as in the previous system between the practical impossibility of imposing countermeasures (according to the special regime) and their applicability by virtue of general international law (in the event of the "fall-back" doctrine being admitted). Rather, it is set between the application of countermeasures governed by the WTO special rules and the possibility of an ulterior resort to further countermeasures sustained by general international law.

The affirmative answer to the raised query finds diverse supports. From a general perspective and regarding the concept of the

those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented".

(77) For instance, A. REICH underlines that the WTO law "[...] has apparently reached a level of development which is so far unprecedented in most other fields of public international law, except EU" (*From diplomacy to law: the juridization of international trade law*, *Nw. J. Int'l L. & Bus.*, vol. 17, 1996/97, pp. 775-849).

(78) Cf. Ernst VERMULST - Bart DRIESSEN, *An overview of the WTO dispute settlement system and its relationship with the Uruguay Round Agreements — Nice on paper but too much stress for the system?*, *JWT*, vol. 29, n. 2, 1995, pp. 131-161; Gary HORLICK, *Dispute resolution mechanism — Will the United States play by the rules*, *JWT*, vol. 29, n. 2, 1995, pp. 163-171.

so-called “self-contained regimes”, Gaetano ARANGIO-RUIZ maintains that even in those agreements in which the parties “[...] expressly indicate that by entering the treaty-based system they exclude the application of certain or of all the general rules of international law on the consequences of internationally wrongful acts [as it could be the case of the quoted DSU Art. 23] the effects of the treaty-based derogation would not survive a violation of the system which was of such gravity and magnitude as to justify, as a proportional measure against the wrongdoing State the suspension or termination of the treaty-based subsystem as a whole” (79). From the concrete WTO study there are also outstanding opinions in favour of a residual invocation of the “fall-back” doctrine (80).

In any case, the relevance of this thesis will depend — as was evidenced upon examining the GATT 1947 practice — on the attitudes that the WTO Members adopt in the face of possible situations of special remedies inefficiency. In the hypothesis that a

(79) In this manner, “by disengaging itself (temporarily or permanently) from the system [as contemplated in Paras. 1, 2 (b) and (c) of Art. 60 of the Vienna Convention on the Law of Treaties] the injured State would be at liberty to pursue its so-called secondary rights by the means of redress set forth in the general rules” (Fourth Report of Gaetano ARANGIO-RUIZ, *loc. cit.*, para. 125).

(80) In this sense, Pierre PESCATORE in DSU Art. 23 comments that “[...] it excludes any attempt at unilateral action of Members as long as the procedures provided for by the Understanding have not been exhausted” and that “[...] one must be aware that an extreme resort still exists and that the possibility of unilateral action as a sanction for disregard of the multilateral rules by single Members is and indispensable guarantee in the world of international law” (*Drafting and analyzing...*, cit. p. 37). See also Michael HAHN, *op. cit.*, pp. 279-283 and 397, considering that if the inefficacy of the special remedies is verified, the DSU Art. 23 does not impede that Members regaining the right to unilaterally enforce their rights under GATT 1994 and the other covered agreements, founding these actions on the general international law as soon as such. Aldo LIGUSTRO, *op. cit.*, pp. 553-554, specifies that the possibility of a “revival” of the general international law remedies should only be admitted in the event of a substantial inefficacy of the special remedies and not of any partial failure of those mechanisms. This author also considers that the WTO system could be qualified as “self-contained regime” only if this term is used “*lato sensu*”, stressing the diverse kinds of limitations that make relative the prohibition of unilateral measures (Cfr., *La soluzione delle controversie nel sistema dell’Organizzazione mondiale del commercio: problemi interpretativi e prassi applicativa*, RDI, vol LXXX, 1997, fasc. 4, pp. 1003-1085, especially pp. 1055-1082).

Member, having exercised its "right to countermeasures" regulated by the WTO rules without obtaining the implementation by the recalcitrant Member, were to consider itself legitimated to invoke general international rules on countermeasures, there should be insistence on the ever-increasing limits imposed by these rules. As has been pointed out regarding the general exclusion of any punitive function of the countermeasures, in certain important aspects these limits (that the ILC has tried to codify and develop in its Draft articles on State responsibility) show a convergence of the principles consecrated in the WTO special regime with the progressive development of general international law. This convergence contributes to reducing the importance of any possible ulterior applicability of the "fall-back" doctrine since, in short, the scope of the "suspension" admitted by general international law would not be substantially superior to that offered by the special regime.

Another possible invocation of general international law as a means to enforce the WTO rules would include applying retort measures (unfriendly yet lawful measures in themselves) or of countermeasures consisting of the non-fulfillment of an international obligation alien to the WTO law. It must be highlighted that, in relation to the GATT 1947, such a possibility was accepted even by authors that denied the applicability of the "fall-back" doctrine ⁽⁸¹⁾.

Finally, it is of interest to underline that when a Member proceeds with the suspension of concessions or other obligations under the DSU provisions it can not obviate the juridical nature of the obligation whose application it seeks to suspend. So, as Paul REUTER points out "[...] dans certains traités multilatéraux chaque partie est tenue simultanément à l'égard de toutes les parties sans que le traité se laisse décomposer en une suite de relations bilat-

(81) So, Laurence BOISSON DE CHAZOURNES, *op. cit.*, pp. 183-184 and 186, specified that "[...] le régime du GATT ne pourrait pas [...] être qualifié de régime complètement auto-suffisant, c'est-à-dire excluant toute interférence extérieure au GATT", because it left place to an intervention of the general international law through the resort to "des contre-mesures qui n'entraînent pas un manquement à l'Accord général".

érales" (82). These are multilateral agreements directed to protect collective interests and whose obligations have an integral character, excluding all relations of synallagmatic reciprocity, or of an interdependent nature, being assumed *erga omnes partes contractantes*, so that the unilateral suspension of its application by way of countermeasures would imply not just a reaction against the wrongdoing party but also an unjustified violation of the rights of the other parties (83).

Although this special juridical nature does not seem to likely to form part of the general nature of the obligations established under the WTO law (84), it could be present in some of them. This is the

(82) *Solidarité et divisibilité des engagements conventionnels*, in Y. DISTEIN (ed.), *International law in a time of perplexity*, Kluwer Academic Publishers, Dordrecht, 1989, pp. 623-634, at p. 623.

(83) The ILC Draft articles on State responsibility contemplates the existence of such multilateral agreements when in its Art. 40, after establishing that "injured State" means any State having a right which is infringed by the act of another State which constitutes an internationally wrongful act of that State (Para. 1), provides in its Para. 2 that: "In particular, "injured State" means: [...] (e) if the right infringed by the act of a State arises from a multilateral treaty [...] any other State party to the multilateral treaty [...] if it is established that: [...] (ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty [...] (iii) the right has been created or is established for the protection of human rights and fundamental freedoms; (f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection for the collective interests of the States parties thereto" (for the commentary to the article (former Art. 5), see *YILC*, 1985, vol. II (Part Two), pp. 25-27. See about these multilateral agreements (with an integral character — as an agreement for the protection of human rights — or an interdependent character — as a disarmament agreement): *Third Report on the law of treaties* by Sir Gerald FITZMAURICE, *Special Rapporteur*, doc. A/CN.4/115, paras. 91-93; Willem RIPHAGEN, *State responsibility: new theories of obligations in interstate relations*, in R.St.J. MACDONALD - D.M. JOHNSTON (ed.), *The structure of and process of international law: essays in legal philosophy doctrine and theory*, Dordrecht/Boston/Lancaster, 1986, pp. 581-625, at pp. 600-603, describing such cases of creation of extra-state interests, one of whose examples would be the EC law; Cristina CAMPIGLIO, *Il principio di reciprocità nel diritto dei trattati*, CEDAM, Padova, 1995, pp. 102-138 and 290-309.

(84) In this sense, Michael J. HAHN, after thinking about the hypothesis that the obligations of GATT were to be fulfilled *erga omnes partes contractantes*, reaches the conclusion that the basic structure of these obligations is against such

case, for example, of the obligations embodying the principle of transparency, because the Appellate Body has recognized the extra-state interests involved in Para. 2 of GATT Art. X, entitled "Publication and Administration of Trade Regulations" ⁽⁸⁵⁾. This points out that the full disclosure of governmental acts is not only established to benefit the other Members but also "private persons and enterprises, whether of domestic or foreign nationality" ⁽⁸⁶⁾. Such an assertion, although of limited scope, tends to reinforce the consideration of the WTO multilateral regime not as a mere network of bilateral relationships between its Members but rather as a regime of an integral nature ⁽⁸⁷⁾, with the corresponding limits that it would entail for the application of countermeasures ⁽⁸⁸⁾.

1.2. *The operability of the "suspension" in complaints not founded on an infraction of the covered agreements.*

As indicated in the introduction to the present study, complaints

qualification, specifying both GATT 1947 and GATT 1994 (or the other covered agreements) remain treaties establishing bilateral right-obligation relationships between the contracting parties (*op. cit.*, Part 3 and p. 396).

(85) According to the GATT Art. X:2: "No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published".

(86) See "United States - Restrictions on imports of cotton and man-made fibre underwear", Report of the Appellate Body (AB-1996-3), doc. WT/DS24/AB/R, 10-Feb-1997, p. 23.

(87) Regime that, in the line postulated by Ernst-Ulrich PETERSMANN, would go essentially to protect the rights of the *homo economicus* (see *Constitutionalism and International Organizations*, *Nw. J. Int'l L. & Bus.*, vol. 17, 1996-97, pp. 398-469, especially, pp. 427 and 454, where it remarks that GATT/WTO rules serve "[...] for the protection of freedom, non discrimination and rule of law in the trans-national relations of individual citizens".

(88) According to Willem RIPHAGEN the extra-state interests created by certain multilateral treaties "[...] make the breach and the countermeasure a matter which regards the group of States parties to the treaty as a whole", (*State responsibility: new theories of obligations...*, cit., p. 602). In this way, if a WTO Member seeks to suspend its duties of transparency as a countermeasure it should take into account that, with such an action, it could be violating without justification the rights of the other Members as a whole.

not founded on an infraction of the covered agreements, which in the GATT 1947 practice had a marginal role, are the object of a specific regulation by DSU Art. 26. This dedicates its paragraph 1 to non-violation complaints of the type described in paragraph 1(b) of Art. XXIII of GATT 1994 (the so-called “non-violation complaints”) and its paragraph 2 to complaints of the type described in paragraph 1(c) of Article XXIII of GATT 1994 (the so-called “situations complaints”).

To the ends of this study it is of interest to examine the operability of the suspension of concessions or other obligations under the covered agreements as the “last remedy” in such complaints.

In regard to “situation complaints”, a modality that in the GATT 1947 practice could be considered as fallen into *disuse* ⁽⁸⁹⁾, the DSU resolves that the “dispute settlement rules and procedures contained in Decision of 12 April 1989 (BISD 36S/61-67) shall apply to consideration for adoption, and surveillance ad implementation of recommendations and rulings” ⁽⁹⁰⁾. This remission to the pre-WTO regime entails the inapplicability of the new rule of the negative consensus in some of the most crucial phases of the procedure and, particularly, in the implementation. Continuity with the previous systems means that in the case of a complaint of this type being raised, any authorization of suspension of concessions or other obligations would be a remote possibility.

As to “non-violation complaints”, the DSU provides the application of its general rules subjected to the specialities established in its Art. 26, Para. 1. Among these specialities that resolve, for example, that in such cases there is no obligation to withdraw measures that were found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, no exclusion of the applicability of

(89) See Ernst-Ulrich PETERSMANN, *GATT/WTO Dispute Settlement System...* cit., pp. 74 and 173-175, considering that “in view of the vague language and criteria for such “situations complaints” [...] it is to be welcomed that these imprecise types of complaints seem to have fallen into disuse”.

(90) DSU Art. 26.2.

the general rules on "suspension of concessions or other obligations" is provided. Hence, the general provisions about the "last remedy" foreseen by DSU to the Member invoking its procedures, contained in the aforementioned DSU Art. 22 seem to be applicable in the case of "non-violation complaints".

It must be indicated that, although some opinions have been expressed against this applicability ⁽⁹¹⁾, this is corroborated by the general rules themselves on "suspension", taking into account with clear references the assumptions that may be deduced from cases of "non-violation complaint" ⁽⁹²⁾.

Once having confirmed the applicability of the "suspension" in "non-violation complaints" that count on express doctrinal supports ⁽⁹³⁾, and keeping in mind that the DSB will also proceed

(91) So, Pierre PESCATORE maintains that "there can be no sanction in the case of non-violation complaint", concluding that "this theoretical construction has led in fact to a weakening of legal protection" (*The New WTO Dispute Settlement Mechanism*, Paper presented in the Liège Conference on Regional Trade Agreements and Multilateral Rules, 3-5 October 1996, p. 14). This statement would be sustained in the non-forcible nature in such cases of the withdrawal of the damaging measure (*ibid.*). On the other hand, it is not in vain to remember the criticisms that the quoted author, already referring to the GATT 1947, had directed against this category of complaints, which he considered a "legal fantasy" and "a useless and dangerous construction" that should be erased in order to avoid fruitless doctrinal speculations (*The GATT Dispute Settlement Mechanism...*, cit., p. 19).

(92) In this way, when DSU Art. 22 regulates in its Para. 3 the principles and procedures that the complaining party should consider when proceeding with a suspension, providing in its letter (a) that "the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment", it presupposes, with the inclusion as an alternative to the violation cases of the term "or other nullification or impairment", the applicability of this remedy in "non-violation complaints". This alternative reappears in letter (d) (ii) of the paragraph at issue. Likewise, in Para. 8 of Article in question, detailing the temporary character of the "suspension", it is specified that "the suspension shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed [hypothesis that could only refer to violation complaints], or the Member that must implement recommendations or rulings, provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached", hypothesis that can cover the peculiarities of the "non-violation complaints".

(93) See Aldo LIGUSTRO, *Le controversie tra Stati...*, cit., p. 610; Ernst-Ulrich PETERSMANN, *GATT/WTO dispute settlement...*, cit. pp. 143 and 173.

according to the rule of the negative consensus for its authorization, thus guaranteeing its exercise to the prevailing party, it is necessary to determine the juridical foundation of such "suspension".

In contrast to cases of "violation complaints" in which, as said, the final foundation of the "suspension" lies in the countermeasures institution, in "non violation complaints" it does not seem, in principle, that such a foundation can be invoked because the measure impugned is not inconsistent with the GATT 1994 or other covered agreements.

Even so, the interpretation given in the GATT 1947 practice to the requirements on which such complaints should be based implied a severe restriction of their potential scope, demanding that the conduct of the defendant party should entail a frustration of reasonable expectations, based on reciprocal tariff negotiations, with regard to the maintenance of the conditions of competition prevailing at the time of the negotiations, or concerning the agreed balance of reciprocal tariff concessions ⁽⁹⁴⁾. So, "non-violations complaints" have been considered a specification of the principle of good faith ⁽⁹⁵⁾.

According to such a traditional interpretation of the "non-violation complaints", it can therefore be asserted that the foundation of a possible suspension of concessions or other obligations would also be the countermeasures institution as, despite there not being any

(94) *Ibid*, pp. 150-170. See also Ernst-Ulrich PETERSMANN, *Violation complaints and non-violation complaints in public international trade law*, *GYIL*, vol. 34, 1991, pgses 175-229; Armin VON BOGDANDY, *The non-violation procedure of Article XXIII:2, GATT - Its operational rationale*, *JWT*, vol. 26, n. 4, 1992, pp. 95-111.

(95) In this sense, Willem RIPHAGEN referred "non-violation complaints" to the GATT for "nullification or impairment" as an example of clauses which, while not creating *per se* rights and obligations, introducing "good faith" expansions of the field of relationship, or object and purpose" of a treaty (see his *Third report on the content, forms and degrees of international responsibility...*, cit., doc. A/CN.4/354, para. 102, footnote 97 and para. 43, footnote 134, reproduced in *YILC*, 1982, vol. II (Part One), pp. 39 and 43. See also Par HALLSTRÖM, *The GATT panels and the formation of the international trade law*, Jurisförlaget, Stockholm, 1995, p. 175. The principle of "good faith" is codified, for instance, in Article 26 of the Vienna Convention on the Law of Treaties, titled "*Pacta sunt servanda*": "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

wording on any previous infraction of the covered agreements, there would indeed be a violation of the principle of good faith.

In the event of a wider interpretation of the “non-violation complaints” being verified under the WTO, just as certain authors maintain their claim to their applicability against behaviours which — according to the traditional approaches — cannot be reported to a violation of the principle of good faith such as the tolerance of business restrictive practices ⁽⁹⁶⁾, then the foundation of a suspension of concessions or other obligations would lie in the principle of equilibrium or balance between rights and obligations inspiring the GATT/WTO law. This principle justifies, for example, that when a Member applies a safeguard measure, lawful by definition, then another Member affected by that measure can suspend the application of substantially equivalent concessions or other obligations to the former Member’s trade ⁽⁹⁷⁾.

2. “Suspension” as a countermeasure against a prior violation of an international rule outside the WTO law.

In the analysis of the specific regimes of international law which, as in the case of the GATT/WTO law, establish concrete limits to

(96) From the point of view of C. O’Neal TAYLOR, the WTO should reconsider and broaden the traditional narrowly interpretation of “non-violation complaints” scope “[...] to capture US Section 301/Unreasonable cases, and thereby limit the possible use of future aggressive unilateralism” against trading partners which, for example, do not maintain an adequate competition policy, *The limits of economic power: Section 301 and the World Trade Organization dispute settlement system*, *Vand. J. Trans’l L.*, vol. 30, 1997, pp. 209-348, at pp. 284-287. It must be noted that some of the “non-violations complaints” raised under DSU provisions reveal that the complaining parties are favourable to this more expansively interpretation (see, for instance, the US complaint in the case “Japan - Measures affecting distribution services” (WT/DS45, 13-Jun-1996), which includes a non-violation claim).

(97) See GATT 1994 Art. XIX (“Emergency action on imports of particular products”), Para. 3 and Agreement on Safeguards Art. 8 (“Level of concessions and other obligations”) Paras. 2 and 3 (which specifies: “The right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this agreement”).

the exercise of countermeasures, it has emerged that such limits only govern the reactions against violations of its own agreements, without conditioning the non-compliance of the obligations in question as countermeasure against a prior violation of an alien rule. Hence, even in those systems that aspire to being "self-contained regimes" and excluding the operability of the self-help, the principle of speciality restricts the sphere of validity of their specific secondary rules to regulating the outcome of unlawful acts occurring "within" the system, with general international law intervening in regard to the outcome of unlawful acts that occurred "outside" the system ⁽⁹⁸⁾.

Given the prohibition to use armed reprisals in contemporary international law ⁽⁹⁹⁾, the use of economic pressure seems to be one of the principal remaining effective possibilities to enforce international obligations ⁽¹⁰⁰⁾. When these measures of economic pressure are applied between States linked by trade agreements it is highly probable that such measures would be inconsistent with those agreements and that they should be justified as countermeasures founded on general international law.

In adopting the GATT 1947, one was already aware of the application of measures of economic pressure not motivated by commercial reasons. So, its Art. XXI included a series of "Security

(98) See Denis ALLAND, *op. cit.*, pp. 289-290, who specifies that the particular legal consequences arising from an unlawful act established by an special regime do not operate "[...] lorsque la non exécution d'une obligation appartenant à un régime se suffisant à lui-même vient en réaction à la non-observation d'une obligation extérieure à ce régime".

(99) See Article 2 (4) of the United Nations Charter and General Assembly's Declaration on Principles of international law concerning friendly relations and Co-operation among States of 24th October 1970 (Res. 2625 (XXV), UN GAOR Sup. 28, p. 121, doc. A/8082 (1970)).

(100) Cf., for instance: Derek W. BOWETT, *Economic coercion and reprisals by States*, Va. J. Int'l L., vol. 13, n. 1, 1972, pp. 1-12; Pierre-Marie DUPUY, *Observations sur la pratique récente des sanctions de l'illicite*, RGDIP, vol. 87, 1983, pp. 505-527; Andrea DE GUTTRY, *op. cit.*; SOCIÉTÉ BELGE DE DROIT INTERNATIONAL (Colloque des 26 et 27 octobre 1984), *Les moyens de pression économiques et le droit international*, RBDI, vol. 18 (monographic number), 1984-1985; Omer Y. ELAGAB, *The legality of non-forcible countermeasures in international law*, Oxford, 1988.

Exceptions" ⁽¹⁰¹⁾ the wording of which has been upheld in the GATT 1994 and reproduced in other covered agreements ⁽¹⁰²⁾. Among such exceptions one can highlight those regarding actions "in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security", recognizing the prevailing nature of the Charter established by its Art. 103 and justifying the non-fulfillment of GATT/WTO obligations in applying "penalties" imposed by the Security Council ⁽¹⁰³⁾, and to actions "taken in time of war or other emergency international relations".

In regard to these latter actions, it has been underlined that the use of the term "emergency" can give rise, given its uncertainty, to very diverse interpretations of the scope of the exception ⁽¹⁰⁴⁾. In

(101) According to Article XXI of GATT: "Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

(102) See GATS Article XIV *bis* and TRIPS Article 73 on "Security Exceptions".

(103) See Thiébaud FLORY, *Article 103*, in Jean-Pierre COT - Alain PELLET (eds.), *La Charte des Nations Unies*, 2nd ed., Economica, Paris, 1991, pp. 1381 ff.; René-Jean DUPUY (ed.), *Le développement du rôle du Conseil de Sécurité*, Colloque/Workshop de l'Académie de Droit International de La Haye, Dordrecht, 1993.

(104) See Dominique CARREAU, *Les moyens de pression économique au regard du FMI, du GATT et de l'OCDE*, RBDI, vol. 18, pp. 20-33, at pp. 25-26 ("[...] Même s'il est loisible de noter que cet article XXI du GATT est potentiellement dangereux en raison de son imprécision, il demeure acquis que des considérations tirées de la sécurité interne ou internationale de l'État peuvent justifier des mesures commerciales restrictives contraires à la lettre et à l'esprit de l'Accord Général: le GATT n'en a jamais contesté la légalité"; Michael J. HAIN, *Vital interests and the law of GATT: an analysis of GATT's security exception*, *Mich. J. Int'l L.*,

principle, the wording and context of the provision seem to suggest that the term “emergency” covers situations analogous to war or involving, or at least very likely to involve, the use of force, but the possibility of wider interpretations is observed ⁽¹⁰⁵⁾.

Anyway, a measure of economic pressure against a WTO Member covered by the aforementioned “security exception” does not need to be justified by virtue of general international law rules on countermeasures, because the very GATT/WTO law itself recognizes its lawfulness as long as it is an exercise of one of its exceptions.

Some scholars have upheld that the “security exception”, by means of which certain non-compliance with the GATT/WTO law is legitimate, would exclude the possibility of invoking general international law rules on countermeasures as a way of justifying the suspension of GATT 1947 (*nunc* WTO) obligations as a reaction against any prior violation of an international rule “outside” the GATT/WTO law and not involving a security issue ⁽¹⁰⁶⁾.

In practice, such reasoning would imply that WTO Members would have renounced the application of an extensive range of economic countermeasures to react against internationally wrongful acts not affecting their security, as many trade reprisals represent inconsistent behaviour with the general most-favoured-nation treatment and with the general prohibition of import restrictions ⁽¹⁰⁷⁾. On the other hand, it does not seem that the “security exception” provision is sufficient to replace the operability of general international law. So, the fact that certain measures are legitimated as “treaty exceptions” is irrespective of the fact that other measures are

vol. 12, 1991, pp. 558-620; *Id.*, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie*, cit., pp. 343-371.

(105) See Kees Jan KUILWIJK, *Castro's Cuba and the US Helms-Burton Act - An interpretation of the GATT security exception*, *JWT*, vol. 31, n. 3, 1997, pp. 49-61, at p 53.

(106) In this sense, Laurence BOISSON DE CHAZOURNES, *op. cit.*, p. 184, considers that: “[...] le régime du GATT ne permet pas qu'un fait générateur ne relevant pas du champ d'application de l'Accord général puisse justifier un manquement aux dispositions de l'Accord général, au titre d'un exercice de contre-mesures”.

(107) See GATT Articles I and XI.

considered *per se* as "treaty violations", and silence is upheld concerning their possible justification if these measures respect all the substantial and procedural requirements established by general international law on countermeasures ⁽¹⁰⁸⁾.

Some authors, trying to harmonize the particular regime of the WTO with general international law rules on countermeasures, suggest that the term "other emergency in international relations" of GATT Art. XXI (b) (iii) and other WTO analogous provisions refers to "situations which are serious enough to permit States under general international law to resort to the use of economic reprisals"; situations which are identified as the prior commission by the contracting party against which the action is directed of "an international wrong, i.e. either a violation of a treaty or a customary law obligation" ⁽¹⁰⁹⁾.

Such interpretation would mean incorporating within the content of the WTO special provisions (in the category of "security exceptions") the operation of general international rules on countermeasures. The main advantage of this interpretation would be the objective delimitation of the scope of the security exception. However, the wording and the context of the term "other emergency in international relations", closely linked to problems of "security" related to the use of force, do not seem to admit the proposed interpretation.

The solution probably does not consist of redefining the content of the "security exceptions", but rather of assuming that the oper-

(108) It must be remembered that according to the ICJ: "The silence of a treaty [...] could not be interpreted as implying the exclusion of a right which has its source outside the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded ("Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)", Advisory Opinion, *ICJ Reports* 1971, p. 16, at p. 47, para. 96). In this sense, Linos-Alexandros SICILIANOS, *op. cit.*, p. 261, underlines that: "[...] le fait que les traités en général [...] ne prévoient normalement la possibilité de contre-mesures en dehors du cadre conventionnel [...] ne signifie pas pour autant que des réactions dont la source se situe en droit coutumier se trouvent *ipso facto* exclues".

(109) Kees Jan KUIJWIK, *op. cit.*, pp. 54 and 61. See also Michael J. HAHN, *Vital interests and...*, *cit.*, especially pp. 589-602.

ability of general international rules on countermeasures can justify, by itself, a suspension of the WTO obligations as a reaction against a prior internationally wrongful act on the fringe of the special provisions.

Some cases of the GATT 1947 practice seem to confirm such a thesis. So, on notorious occasions, certain contracting parties felt themselves legitimated by virtue of general international law to apply trade reprisals against a contracting party that had violated its international obligations on human rights ⁽¹¹⁰⁾.

Another very illustrative example of this was the argument raised by the Federal Republic of Germany in order to justify its ban introduced in November 1974 on direct landings of Iceland fish in its harbours. Iceland considered that the German ban was a breach of the GATT obligations and requested consultations under Article XXII:1 of the General Agreement. The German Government, however, took the view that the GATT provisions were not applicable in this case, because its ban had been imposed in retaliation for an incident in which a German trawler, fishing off the coast of Iceland, had been illegally arrested and that therefore its ban was "a justified countermeasure fully in line with the general principles and rules of international law" ⁽¹¹¹⁾. Iceland alleged that the German arguments were "irrelevant", as the GATT "could only be concerned with the application of the functioning of the General Agreement and not

(110) For instance, from 1960, diverse GATT contracting parties, mainly of Africa, applied a trade embargo against South Africa, invoking that the apartheid policies violated an international rule of fundamental importance. Another case is the trade embargo adopted in 1978 by the US against Uganda in response to the gross violations of human rights, as the genocide crime, committed under the Government of General Idi Amin; an embargo that an official of the US executive did not consider covered under any of the GATT exceptions. See on the indicated cases: FREDMAN, *US trade sanctions against Uganda: legality under international law*, *Law & Pol'y in Int'l Bus.*, 1979, pp. 1149-1191; GROVE, *International trade: lifting of Uganda trade restrictions*, *Harv. Int'l L. J.*, 1979, p. 706, footnote 19; Linos-Alexandros SICILIANOS, *op. cit.*, p. 262; Luigi MIGLIORINO, *Le restrizioni all'esportazione nel diritto internazionale*, Padova, CEDAM, 1993, pp. 114-115; Carlo FOCARELLI, *op. cit.*, pp. 39-40 and 44-45, specially footnote 24.

(111) See *GATT Activities*, 1975, p. 59 and GATT Council, Minutes of Meeting held February 18, 1975, doc. C/M/103, p. 15 (reproduced in *Analytical Index*, vol. 2, pp. 718-719).

with any other international principles". Germany answered that: "[...] the General Agreement did not represent an isolated legal system. Rather, it was embedded in the general rules of international law" (112). The German Government did not try to justify its ban by virtue of the GATT exceptions, because it considered its legitimacy as sufficient in the light of general international law, and no panel was established.

Now then, what would have happened if a panel has been able to pronounce itself on the issue? Or, in wider terms, what answer can a panel (or the Appellate Body) give to any such invocation by a Member of the general international rules on countermeasures?

The solution to the raised queries is determined by the limits established with regard to the panels' "jurisdiction" and to the law that they can apply. Such limits are defined in the so-called "terms of reference" for the panels, limiting their competence to examining the disputes "in the light of the WTO law" (113).

This limitation of the law to be applied by the panels has its origin in the sphere of the very competencies of the WTO (114) and it is a manifestation, ultimately, of the consensus nature that sets the grounds for the international procedures for settling disputes and qualifies international jurisdiction as voluntary. So, as Angelo Piero SERENI underlined, the parties in the international proceedings can

(112) *Ibid.*, p. 16

(113) See DSU Art. 7, devoted to "Terms of reference" which establish the following standard terms of reference (unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel): "To examine, *in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute)*, the matter to the DSB by (name of party) in document... and to make such findings as will assist the DSB in making recommendations or in giving the rulings *provided for in that/those agreement(s)*" (emphasis added).

(114) In this sense, it has been specified that the bodies established in an International Organization for the settlement of disputes can only examine the controversies from the particular perspective defined by the legal order of the Organization itself in question (see Maria Paz ANDRÉS SAENZ DE SANTA MARIA, *El arreglo pacífico de controversias en el ámbito de las Organizaciones internacionales*, *Cursos de Derecho Internacional de Vitoria-Gasteiz*, 1985, pp. 79-14, at pp. 90 and 92).

determine the rules on which the decision is to be based ⁽¹¹⁵⁾. In the WTO this consent is manifested, in principle, in the quoted "standard terms of reference".

In the GATT 1947 practice, the panels recognized the limitation of their competence as the examination of the disputes in the light of the GATT law, specified in their terms of reference, making it explicit in several cases that their activities and findings would be limited "within the four corners of GATT". In this way, when a party insisted that a dispute was not limited to the commercial aspects covered by the GATT rules and alleged the application of other international law rules, general or specific, the panels specifically replied that they would hear of the disputes raised "solely in the light" of the aforementioned "four corners of GATT", "without detriment" to any other rules alleged ⁽¹¹⁶⁾.

The panels did not deny that, in certain cases, the application of other international rules "alien" to the "four corners of GATT" could justify a measure inconsistent with the specific GATT rules and they merely asserted that they could not take them into account, considering that this fact would not impede an isolated pronouncement on the purely commercial aspect of a controversy ⁽¹¹⁷⁾.

(115) *Principi generali di diritto e processo internazionale*, Giuffrè, Milano, 1955, pp. 59-63.

(116) See the 1984 Panel Report on "Canada - Administration of the Foreign Investment Review Act", adopted on 7-Feb-84, doc. L/5504, reproduced in BISD 30S/140, p. 141, para. 1.4 and p. 157, para. 5.1 (in which the panel limited its examination of investment measures to those included "within the four corners of GATT"); the 1987 Panel Report on "US — Taxes on petroleum and certain imported substances", adopted on 17-Jun-87 (doc. 6175, reproduced in BISD 34S/136, p. 162, para 5.2.6 (in which the panel considered that it could not examine the consistency of the US measures with the "Polluter-pays principle", invoked by the EEC, because it was adopted in another International Organization (the OECD); the 1987 Panel Report on "Canada - Measures affecting exports of unprocessed herring and salmon", adopted on 22-Mar-88, doc. L/6268, reproduced in BISD 35S/98, para. 5.3 (in which the panel considered that the invocation by Canada of international agreements on fisheries and the principles contained in the 1982 Convention on the Law of the Sea could not be taken into account, because "[...] its mandate was limited to the examination of Canada's measures in the light of the relevant provisions of the General Agreement").

(117) So, in the 1984 case on Nicaragua v. US — Imports of sugar from Nicaragua (see the Panel Report in doc. L/5607, adopted on 2-Mar-84, reproduced

The commented practice reveals that, beyond a panel's particular findings, other rules of international law such as the general international rules on countermeasures could justify certain behaviour in contrast to the special GATT/WTO rules. In such a case, the value of a panel/Appellate Body's report would be characterized by its relativity, since the "losing" party could continue to invoke other international law rules, in relation to which it had not operated a third party adjudication, so as to legitimate its conduct.

In the new WTO framework there will also be disputes whose object includes aspects not covered by the panels' competencies. A clear example of this is the controversy raised by the EC against the US in relation to the reinforcement of the trade embargo imposed on Cuba through the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, also known as the "Helms-Burton Act" ⁽¹¹⁸⁾.

Hence, the panel established by the DSB on 20 November 1996 ⁽¹¹⁹⁾ whose work was suspended at a request of the EC on 25 April 1997, would have to examine, if it were to re-start its work, the possible justification of the US measures under the "security exceptions", determining the scope of the discussed term "other emer-

in BISD S31/67, the US did not try to justify the restrictions imposed to the importation of Nicaraguan sugar invoking a GATT exception, but they considered that the trade issue was included in a broader political question and claimed that discussion in purely trade terms "would be disingenuous". But the panel did not abstain from learning of the topic and it indicated that, although "the measures taken by the United States [...] were but one aspect of a more general problem", it "examined those measures solely in the light of the relevant GATT provisions, concerning itself only with the trade issue under dispute" (*loc. cit.*, para. 4.1).

(118) This Act was signed into law on 12 March 1996 by the US President Bill Clinton (Pub. L. No. 104-114, 110 Stat 785 (Mar. 12, 1996), reproduced in *ILM*, 1996, n. 2, pp. 357-378. On the "Helms-Burton Act" see, *inter alia*: Andreas F. LOWENFELD, *Congress and Cuba: the Helms-Burton Act*, *AJIL*, 1996, n. 2, pp. 431-432; August REINISCH, *Widening the US embargo against Cuba extra-territorially: a few public international law comments on the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, *EJIL*, vol. 7, n. 4, 1996, pp. 545-570; Brigitte STERN, *Vers la mondialisation juridique? les Lois Helms-Burton et D'Amato-Kennedy*, *RGDIP*, 1996, n. 4, pp. 979-100; J.L. SNYDER - S. AGOSTINI, *New US legislation to deter investment in Cuba - A first glance*, *JWT*, vol. 30, n. 4, 1996, pp. 37-44.

(119) After the failure of the bilateral consultations, the EC requested the setup of a panel on 3 October 1996 (see doc. WT/DS38/2, 4-Oct-96).

gency situation international relations". Even so, the US arguments are not limited to invoking the "security exceptions" to justify its measures, but rather it also tried to present its behaviour as countermeasures against the violation by the Cuban Government of fundamental human rights, its illicit confiscation of properties of US citizens, its promotion of the international illicit traffic of drugs, etc... ⁽¹²⁰⁾; allegations which, irrespective of their possible foundation, cannot be examined by a panel that soon. The panel's report on the dispute would be, for this reason, only partial. In this way, and although US measures were considered inconsistent with the WTO law, the US could continue invoking another "sources" of legitimacy not evaluated by the panel.

On the other hand, from the EC perspective, the US measures have violated not only the WTO law, but also other international law rules, attempting against the sovereignty and independence of the States, appreciations that are located beyond the competencies of the panels and that have already motivated the EC's adopting retort measures directed towards counteracting the extraterritorial effect of the Helms-Burton act ⁽¹²¹⁾. In this way, even in the hypothetical case that a panel or the Appellate Body did not condemn the US measures by understanding them as justified under the "security exception" ⁽¹²²⁾, many other questions raised in the controversy would still need to be resolved.

In short, it seems that in such complex controversies as those examined and in which such very diverse international law rules are

(120) See the US Congress introduction to the Helms-Burton Act (reproduced in *Documents d'actualité internationale*, n. 19, 1st October 1996, pp. 810-811).

(121) See FRANCISCO J. GARCIMARTÍN ALFÉREZ, *La reacción europea a las sanciones norteamericanas contra Cuba, Irán y Libia - El Reglamento n. 2271/96 del Consejo*, dated 22 Nov. 1996, 1997, *Series B-120*, pp. 19-23; ANDREU OLESTI RAYO, *La actuación de la Unión Europea en respuesta a la ley Helms-Burton*, *REDI*, vol. XLVIII, 1996, n. 2, pp. 389-398.

(122) Hypothesis rejected, for instance, by: OLIVIA Q. SWAAK-GOLDMAN, *Who defines Members' security interests in the WTO*, *Leiden J. Int'l L.*, vol. 9, 1996, pp. 361-371; RIYAZ DATTU - JOHN BOSCARIOL, *GATT Article XXI, Helms-Burton and the continuing abuse of the national security exception*, *Can. Bus. L. J.*, vol. 28, 1997, pp. 198-220; KEES JAN KUILWIJK, *op. cit.*, p. 61.

alleged, resorting to a panel/Appellate Body, whose appreciation will be bound within the "four corners of WTO law", will only provide a partial and relative solution of the dispute.

3. "*Suspension*" as a unilateral measure taken with the intention of affirming a law in statu nascendi.

As indicated in the introduction to this study, States sometimes do not try to justify their behaviour inconsistent with international law by virtue of the standing rules, invoking one of the possible circumstances precluding wrongfulness⁽¹²³⁾. Rather, such conduct is presented as manifestations of their intention to modify the standing law.

So, although Christian TOMUSCHAT has underlined that "in contrast to enforcement, law-making can hardly be delegated to community members acting individually", highlighting that "self-help is not a suitable device of law-making"⁽¹²⁴⁾. It has been verified that the lack of a central legislator in international society gives rise to diverse forms of unilateral intervention of the States in order to determine the evolution of international law⁽¹²⁵⁾.

From the perspective of this study, such unilateral actions directed towards promoting a law change are of interest when they consist of measures of economic pressure that imply a "suspension" of the application (non-compliance) of certain trade concessions or other WTO obligations.

In this way, in the GATT 1947/WTO practice there are notorious cases in which a party has not fulfilled its trade obligations to enforce the assumption for other parties of international commit-

(123) See Chapter V (Arts. 29-35) of Part One of the Draft articles on State responsibility provisionally adopted by the ILC on first reading, *loc. cit.*, pp. 135-138, whose art. 30 regards "Countermeasures in respect of an internationally wrongful act".

(124) *Obligations arising for States without or against their will*, RCADI, t. 241, 1993, IV, pp. 195-374, at p. 218.

(125) See Mario GIULIANO - Tullio SCOVAZZI - Tullio TREVES, *Diritto internazionale - Parte generale*, Giuffrè, Milano, 1991, pp. 208-210.

ments in relation to their policies on intellectual property rights, environmental protection or competition law.

The paradigmatic example consists of the application of the provisions of the aforementioned Section 301 of the US Trade Act *et seq.* in relation to the so-called “unreasonable cases” ⁽¹²⁶⁾. Such cases have been defined as covering foreign government practices that are “not necessarily in violation of nor inconsistent with US legal rights”, but which are “deemed to be unfair and inequitable” and allow the US authorities to impose discretionary unilateral “penalties”. The current list of practices defined as “unreasonable” in the 1994 amendments to Section 301 includes, for instance, governmental tolerance of systematic anti-competitive activities or the denial of adequate labour right’s ⁽¹²⁷⁾. In “unreasonable cases” the US recognizes that foreign governmental practice does not violate standing international rules and tries to force a modification of the such rules promoting the “internationalization” of its own policies ⁽¹²⁸⁾.

From the point of view of the WTO, mentioned provisions on “unreasonable cases” can mean that, on certain occasions, the US decides to suspend concessions or its other WTO obligations unilaterally and on the fringe of DSU requirements. So, in event of the US measures being impugned by the targeted Member, a panel or the Appellate Body could declare their inconsistency with the WTO law.

Even so, the US authorities have stressed that as “unreasonable

(126) For example, in 1988 the US imposed import restrictions on certain products from Brazil because this country did not protect the intellectual property rights on pharmaceutical products appropriately, a matter that today is covered by the TRIPS (on this dispute, known as “Pharmaceuticals retaliation” see Robert HUDEC, *Enforcing international ...*, cit., p. 571.

(127) See 19 USC § 2411 (d) (3) (A) - (B), defining “unreasonable” and offering the illustrative list of such practices.

(128) C. O’Neal TAYLOR, *op. cit.*, p. 274, underlines that in unreasonable cases of Section 301 the US “takes the view that it should be allowed to pursue additional legal rules that would satisfy US decreed levels of adequacy even in areas where no multilateral agreement has yet been reached”, underlining that such cases “have traditionally been aimed at reaching bilateral agreements or forcing the issue into the WTO for multilateral consideration”.

cases" concern issues which, in their essence, are not covered by the Uruguay Round agreements, these cases will not be actionable under DSU and, therefore, "in the event that the actions of the foreign government in question fall outside the disciplines of those agreements" Section 301 will remain fully available "without recourse to multilateral dispute settlement procedures" (129).

Such considerations were put into practice when on 16 May 1995 the US, in the framework of its dispute with Japan on auto parts, threatened to apply an increase of 100% on the tariffs applied on Japanese luxury car imports if the Japanese Government did not apply an adequate competition policy against the particular restrictive business practices developed in Japan (the so-called *keiretsu*). Japan invoked the DSU procedures against the US threat, considering that the import surcharges were a breach of the WTO rules, but no panel was established because the dispute was settled through an agreement in which Japan assumed the obligation to apply its competition law more vigorously (130).

The resort to unilateral actions in cases such as the one described is inconsistent with the WTO law and cannot be justified in the light of general international law rules on countermeasures because the targeted State has not committed a prior internationally wrongful act. The mere political will to modify the law motivating similar violations could not justify them from a juridical point of view because, as G. TUNKIN reveals, although in exceptional cases an act inconsistent with the rules in force, like the well-known Proclamation of the United States President TRUMAN dated 28 September 1945 concerning the continental shelf, could be a starting point for creating new rules of international law, "exceptions only confirm the

(129) See the Message from the President of the US transmitting the Uruguay Round Trade Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements, HR Doc. No 316, 103d Cong., 2nd Session. 1 (1994), p. 1035.

(130) See *WTO Focus Newsletter*, n. 3, May-June, 1995, pp. 2-3. The text of the bilateral agreement, reached on 23 August 1995, is reproduced in *ILM*, vol. 34, 1995, pp. 1494 ff.. See also Jagdish BHAGWATI, *The US-Japan car dispute: a monumental mistake*, *Int'l Affairs*, vol. 72, n. 2, 1996, pp. 261-280; Tracy M. ABELS, *The World Trade Organization's first test: the United States-Japan auto dispute*, *UCLA Law Review*, vol. 44, n. 2, 1996, pp. 467-526.

old rule *ex injuria non oritur jus*" (131). In the same way, as pointed out by P. WEIL, the phenomenon via which the violation of a norm can constitute the embryo for the formation of a new rule always depends of the ulterior conduct of the other States (132).

Keeping these premises in mind, it is necessary to analyze two different doctrinal proposals that try to provide a "justification" to the trade "penalties" directed towards forcing a modification of the law and, particularly, to the unilateral measures imposed by the US in the aforementioned "unreasonable cases".

The first of these theses, formulated by R. HUDEC under the expression "justified disobedience" (133), seeks to afford "a policy justification for breaking the law in certain circumstances". This reasoning, invoking some analogies with the behaviour known in some countries as "civil disobedience", tries to limit the resort to unilateralism in order to promote a change in law establishing that this will only be "politically" legitimate when there is an entire series of concurrent conditions (134). In short, such arguments do not aspire to justify the mentioned measures by virtue of international law, but rather assume their illicitness.

The second thesis is the so-called "opposability doctrine", invoked by S. MURASE (135) and T.J. SCHOENBAUM (136), that try to justify

(131) *Politics, law and force in the interstate system*, RCADI, t. 219, 1989, VII, pp. 231-395, p. 274.

(132) *Op. cit.*, p. 168, where it is underlined that "une conduite étatique peut dans certains cas être analysée aussi bien comme la violation d'une règle existante que comme le point de départ ou le maillon d'une *pratique* susceptible de donner naissance à un règne coutumière que la *légitèmera retrospectivement*" (emphasis added).

(133) *Thinking about the New Section 301: beyond good and evil*, in J. BHAGWATI - H.T. PATRICK (eds.), *Aggressive unilateralism...*, cit., pp. 113-159, especially pp. 125-138; ID., *Self-help in international trade disputes*, in *The Proceedings of the 84th annual meeting of the American Society of International Law*, 1990, pp. 33-38.

(134) See the five minimal conditions for such "justified disobedience" in *ibid.*, p. 34.

(135) *Perspectives from International Economic Law on Trans-national Environmental Issues*, RCADI, t. 253, 1995, pp. 283-431, at pp. 359-372.

(136) *The theory of contestable markets in international law — A rationale for "justifiable" unilateralism to combat restrictive business practices?*, JWT, vol. 30, 1996, pp. 161-181.

the resort to unilateral measures in order to promote a change of the standing rules (for instance, forcing other States to apply a high level of environment protection or to adopt an effective competition policy) invoking general international law and, more specifically, the peculiarities of its law-making process.

This thesis is founded on the following postulate: a unilateral measure, although it constitutes a violation of the WTO law (that a panel and the Appellate Body would always condemn because their competencies are limited to their examination within the "four corners" of WTO), could be legitimized by virtue of general international law.

According to the above mentioned authors, the "opposability doctrine" enables a State to assert its rights regarding questions not yet regulated by international law and serves to promote the affirmation of new norms that are *in statu nascendi* in "grey areas" of international practice ⁽¹³⁷⁾. In such situations a measure taken unilaterally by a State cannot be adequately qualified as legal or illegal, but only as opposable or non-opposable. The most illustrative case invoked as an example of a dispute resolved in terms of opposability is the 1951 ICJ Judgement in the *Norwegian Fisheries* case ⁽¹³⁸⁾.

According to S. MURASE, in order for a unilateral action of a State, taken under its domestic law and for which there is no clearly established rule in international law to be "opposable", it should fulfill three requirements: effectiveness, legitimacy (because the measure must conform to "a sense of equity and to the general interests of the international community rather than to the special interests of a particular State or group of States") and good faith ⁽¹³⁹⁾.

(137) *Ibid.*, p. 176.

(138) This famous case involved a dispute between the United Kingdom and Norway over maritime boundaries. The ICJ considered that the ten-mile baseline rule for the mouth of bay invoked by the UK "has not acquired the authority of a general rule of international law" and that it was inapplicable against Norway. Instead, the Court considered that the straight baselines relied upon by Norway through a 1935 act were "opposable" to the UK ("Fisheries case (United Kingdom v. Norway)", Judgement of 18 December 1951, *ICJ Reports* 1951, p. 116, at pp. 131 and 139).

(139) *Op. cit.*, pp. 364-366.

Finally, it is maintained that this doctrine could make certain unilateral measures taken in relation to Section 301 “unreasonable cases” or directed to promote high levels of environmental protection ⁽¹⁴⁰⁾ “opposable”.

The weak point of this doctrine seems to be in its pretence to affirm the “opposability” of certain unilateral measures regardless of the attitude of the affected States. So, although the requirement of legitimacy tries to avoid arbitrary resort to the unilateralism, the essential element permitting the opposability of unilateral acts vis-à-vis third States is not contemplated: the consent or acquiescence of the interested State. This element was, precisely, the basis of the ICJ decision in the quoted *Norwegian Fisheries* case ⁽¹⁴¹⁾ and it is omitted by the commented doctrine. On the other hand, the operability of the acquiescence seems unlikely in the case of the imposition of trade “penalties” destined to force other States to change their domestic policies and/or their competition law.

In summary, faced by such theses that seek to affirm the opposability of certain unilateral measures regardless of the consent of the affected States, it must be underlined that “the creation of customary norms is a process in the coordination of the wills of the States” ⁽¹⁴²⁾, and that when a State commits a violation with the purpose of modifying the standing rules, such pretence will only be opposable and it will be possible to begin the process of forming a new customary rule (bilateral, particular, regional or general) starting off from the moment at which other States share this pretence ⁽¹⁴³⁾. It is necessary to specify that, in the last phase of the formation of a general international rule, the “general consensus” of the international community tends to be imposed on the pure

(140) *Ibid.*, 357-359 and 368-369.

(141) In which the opposability of the Norwegian measures against the UK was justified because, with its traditional attitude, it would have recognized, implicitly, their validity (*ICJ Reports 1951*, p. 139). See José Antonio PASTOR RIDRUEJO, *Curso de Derecho Internacional Público y Organizaciones Internacionales*, 6th ed., Tecnos, Madrid, 1996, p. 175; Jaume SAURA ESTAPÀ, *Límites del mar territorial*, J.M. Bosch, Barcelona, 1996, p. 60, footnote 136.

(142) G.TUNKIN, *op. cit.*, p. 271.

(143) See René-Jean DUPUY, *op. cit.*, pp. 170-174.

voluntarism of the States ⁽¹⁴⁴⁾, but this can not justify the opposability of unilateral measures such as those analyzed. Basically, they seem to be promoted by a reduced group of States, essentially the US and other developed countries and, in any case, these new rules will only be opposable between those States that participate in their formation.

It can not be discarded that, at times, certain behaviour inconsistent with the WTO law may be justified in the light of general international law by virtue of the peculiarities characterizing the international law-making process; a justification whose invocable nature *ratione personae* will depend on the scope acquired by the norm *in statu nascendi*.

On other occasions, the pure political aspirations to modify the standing rules can motivate a violation of the WTO law without any juridical justification ⁽¹⁴⁵⁾. In such cases, while the wrongdoing party contemplates the dispute as a political controversy claiming for a change in law, the injured party can examine it in juridical terms and invoke the DSU procedures. A legal solution furnished by these procedures is always possible, thanks to the new rule of the "negative consensus", but sometimes this juridical approach will not be "opportune" in political terms, showing the limitations of the "jurisdictional" means of dispute settlement in the face of situations in which standing rules are impugned ⁽¹⁴⁶⁾.

Even so, these political aspirations will be conditioned and "channelled" within the institutional structure of the WTO. This one, like a manifestation of the influence of the International Organizations in the development of international law, is characterized as

(144) See Juan-Antonio CARRILLO SALCEDO, *op. cit.*, p. 168.

(145) In this sense, one can highlight the quoted "Statement of administrative action" of the US relating to the Uruguay Round agreements, *loc. cit.*, p. 1035, where it specifies that: "there is no basis for concern that the Uruguay Round agreements in general, or the DSU in particular, will make future Administration more reluctant to apply Section 301 sanctions that may be inconsistent with US trade obligations because such sanctions could engender DSU-authorized counter-retaliation".

(146) See an examination of this issue since a general point of view in Antonio REMIRO BROTONS *et al.*, *Derecho Internacional*, McGraw-Hill, Madrid, 1997, pp. 849-850.

a permanent "forum of negotiation among its Members" (147), allowing a certain centralization of the law-making process and introducing some element of majority accord. This will be evident when the political aspiration of a few Members is thoroughly rejected by the rest, as has occurred at the first Ministerial Conference held in December 1996 in Singapore regarding the so-called "social clause" (148), diminishing the preponderant role of the big powers (149).

Besides, as was indicated *supra*, an evolutionary interpretation of "non-violation" complaints, in according with the objectives and purposes of the system, could also serve to channel within the institutional frame certain political aspirations in favour of an expansion of the matters under the tutelage of the WTO (150).

Concluding Remarks.

The WTO is not a "closed-legal circuit" but rather maintains different kinds of relations with general international law. With regard to self-help, a typical manifestation of the "juxtaposition structure" that constitutes the basis of the international society, the institutional frame of the WTO, maintains various types of dialectical relations: *i*) regarding the enforcement of the WTO law, the DSU confronts the tension verified in the GATT 1947 practice between its special norms that virtually excluded the application of countermeasures, and the invocation on certain occasions of general

(147) See Art. III:2 of the WTO Agreement.

(148) In the Ministerial Conference, the US, France and other developed countries urged the linking of trade and labour standards within WTO, a proposal that was rejected, essentially, by the developing countries. Finally a compromise was reached and the final Ministerial Declaration (WT/MIN(96)/DEC/W, 13-Dec-96, para. 4) explicates, *inter alia*, that "[...] we reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question", in clear contradiction with the inclusion of this issue in the list of Section 301 "unreasonable cases". See Virginia A. LEARY, *The WTO and the Social Clause: Post-Singapore*, *EJIL*, 1997, pp. 118-122.

(149) See Michel VIRALLY, *Panorama du droit international contemporain*, *RCADI*, t. 183, 1983, I, pp. 9-382, at p. 186.

(150) For instance, the competition policy (see section 1.2. of this study).

international rules on countermeasures by virtue of the “fall-back” doctrine, making a synthesis between the consecration, as a “last resort”, of a “right to countermeasures” and its submission to a special regime of rules and controls; *ii*) these special rules of the WTO do not impede the operability of general international law rules on countermeasures against a prior violation of a rule alien to the system beyond the fact that a panel and the Appellate Body can only examine the disputes within the so-called “four corners” of GATT/WTO law and, therefore, they cannot take such arguments into account; *iii*) finally, the political aspirations to modify the standing rules can motivate certain resorts to unilateral measures, but the institutional framework of the WTO can contribute decisively to an orderly “channelling” of those aspirations.

THOMAS SKOUTERIS

CUSTOMARY RULES OF INTERPRETATION OF PUBLIC INTERNATIONAL LAW AND INTERPRETATIVE PRACTICES IN THE WTO DISPUTE SETTLEMENT SYSTEM

SUMMARY: 1. Introductory Remarks. — 2. The Customary Rules of Interpretation of Public International Law. — 3. Treaty Interpretation in the WTO Framework. — 4. Concluding Remarks.

1. *Introductory Remarks.*

This paper investigates the relationship between the customary rules of interpretation of public international law and practices of interpretation in the World Trade Organization (WTO) Dispute Settlement mechanism.

The act of interpretation is obviously not exclusively performed by dispute settlement bodies. In the WTO context, legislative acts of the CONTRACTING PARTIES, authoritative interpretations of treaty provisions, Mutually Agreed Solutions, adopted and unadopted Panel Reports, the application of the WTO Agreement by the contracting parties in their everyday practice, and so forth, are all results of acts of interpretation in a wider sense. In order to develop a more general perception of the issue of interpretation in the WTO, the observer must examine interpretative practices in the whole range of activities mentioned. Due to space considerations, and with due acknowledgment to the handicap resulting from this choice, the present paper will limit itself only to Panel and Appellate Body (AB) Reports in the post-1994 period.

The question of interpretation in the WTO framework is particularly topical, since it touches upon one of the most intensely discussed aspects of the new Dispute Settlement Mechanism,

namely its "judicialization", the move towards a "rule-oriented" system of resolving disputes. Already three years after the conclusion of the Uruguay Round of multilateral trade negotiations, the WTO dispute settlement mechanism is by all accounts a widely used one. Recent literature has hailed the move to progressive judicialization of the system as a positive development and, indeed, some commentators have described it as "one of the most important achievements of international law and policy since World War II" (1). The Dispute Settlement Understanding (DSU) and, in particular, Article 3(2) have been celebrated as instrumental in this move, amongst others on account of the reference made to the relevance of customary rules of interpretation in the clarification of the meaning of treaty provisions. Since the adoption of the DSU, an overwhelming majority of Panel and Appellate Body decisions has invoked the "customary rules of interpretation of public international law" in its deliberations.

Mainstream international legal doctrine considers interpretation to be of fundamental importance in the functioning of a legal system, since it conveys the meaning of a legal rule. The term "interpretation" in legal jargon refers to the act of investigating the meaning of legal texts, of written language. Being so, it has constituted the testing ground of various different conceptions of language, law, and society, and it has divided jurists throughout the traceable history of the discipline.

Rules of interpretation seem to allude more to procedure than substance: they are rules deciding *how* should one decide, how should one prioritize or choose between various possible considerations. They only establish a procedural hierarchy to be respected by the interpreter. In other words, rules of interpretation *as such* do not dictate the content of the final decision. The latter depends on the specifics of the case in question and on the way the interpreter will apply the rules. Mainstream legal doctrine considers interpretation as a *melange* of creativity and mechanical application of rules, more

(1) See, for example, E.-U. PETERSMANN, *The GATT/WTO Dispute Settlement System - International Law, International Organizations and Dispute Settlement* 84 (1997).

than an art than a technique. At the same time, rules of interpretation are perceived to be fundamental for the good functioning of a legal system because, the argument goes, they strongly enhance legal certainty and predictability. This perception is based, amongst others, on the idea that rules of interpretation place constraints and limits on the discretion of the interpreter. If applied "faithfully" and "uniformly" by all interpreters in all cases, this will result to a legal system where chances of arbitrariness, politicization of the proceedings, or "judicial legislation" by the part of the interpreter will be limited considerably and, therefore, certainty and predictability will be enhanced.

In this paper I will discuss the role and function of the rules of interpretation in the structure of the legal argument before the WTO Dispute Settlement mechanism. In other words, I will focus not so much on the frequency with which the Panels or the AB have resorted to the customary rules of interpretation, but the way in which reference to these rules has become a standard feature of those decisions, as well as the consequence of this reference to the argumentative practice of subsequent cases.

I will start by discussing the "customary rules of interpretation of public international law": their content, nature, characteristics. Following what has already been said, I will not try to establish the "real" content of these rules, but rather briefly describe how these rules were experienced by their "founding fathers" and by some of the literature of the time. I will continue by discussing the application of these rules by the WTO dispute settlement mechanisms. Adopted Reports will be examined in detail, and I will attempt to single out those elements that have become a standard feature of Panel and AB decisions ⁽²⁾. I will finally reflect on these findings and venture some thoughts on the role of the "customary rules of interpretation of public international law" in the argumentative practice before the WTO dispute settlement mechanism.

(2) Only Reports adopted before October 1997 (the time of the submission of this paper) will be discussed.

2. *The Customary Rules of Interpretation of Public International Law.*

Contemporary mainstream legal thought maintains that rules of interpretation can be instrumental in enhancing certainty and predictability within a legal system. It is generally believed that once a set of primary legal rules has been established, consistency in the application of those primary rules will be safeguarded by the use of rules of interpretation. The need for an institutionalized or conventional set of rules was extensively debated in the context of the discussions of the International Law Commission (ILC) over the necessity of preparing a "code" on the law of treaties, starting with the late 1940s and culminating with the signing of the 1969 Vienna Convention on the Law of Treaties (VCLT) ⁽³⁾. The discussions on interpretation led to the eventual adoption and inclusion of Articles 31 and 32 in the VCLT, provisions we will examine in greater detail in the following pages. In the first sessions of the newly established ILC in 1949 and 1950, interpretation figured in the agenda as a topic which ought to be treated "by future reports", although there was quite some disagreement among the members of the ILC over the way this should be administered. After various delays and difficulties, the first draft articles on interpretation were submitted by the Special Rapporteur of the time, Sir Humphrey Waldock, only in 1964 ⁽⁴⁾, that is fifteen years after the beginning of the debate, and only two years before the adoption of the final set of articles by the ILC.

There are three questions cutting through the whole debate before the ILC that constitute a necessary background against which the issue of interpretation must be seen today. The *first* question, of a general nature, was whether the law of treaties in general was suitable for codification in the form of an international convention.

(3) See Articles. 31 & 32 VCLT, 1155 UNTS 331 (1969).

(4) See the Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, UN Doc. A/CN.4/167 and Add. 1-3, YbILC 5 (1964-II). Actually, the second Special Rapporteur, H. Lauterpacht, initiated some work on the matter as early as in 1953 Report, but was unable to publish it because of the priority given to other parts of the Report and his appointment as a Judge of the ICJ.

The argument against codification was that, given the development of law of treaties by that time, the character of any possible provisions on the law of treaties could only be too general and abstract. For this reason, these principles and abstract rules should be stated only in the form of an explanatory code ⁽⁵⁾. This reflected an established position of the ILC during the first ten years of the discussion ⁽⁶⁾, which was reversed only in 1961 in favour of the conventional form ⁽⁷⁾, but basically on account of the argument that an international convention would more easily accommodate the views of the newly established states. The argument of the non-suitability of the topic for codification, however, remained pertinent until the last moments of the process ⁽⁸⁾.

The *second* question concerned interpretation in particular. The utility, even the possibility, of a set of provisions on interpretation were doubted by many members of the ILC since the beginning. The argument went that the various methods of interpretation used are, for the most part, principles of logic and good sense, valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions they employed in a document ⁽⁹⁾. Their suitability for use in any given cases hinges on a variety of considerations which first have to be appreciated by the interpreter. Recourse to such principles is discretionary rather than obligatory, and the interpretation of a document is to a large extent an art and not a science. Although the ILC finally decided in favour of treaty rules and not guidelines, Sir Waldock hastened to qualify

(5) *Id.*

(6) *See*, in this respect, the comments of SIR WALDOCK, in his 1962 Report: *First Report on the Law of Treaties*, by Sir Humphrey Waldock, Special Rapporteur, UN Doc. A/CN.4/144, YbILC 29-30 (1962-II).

(7) *See* the discussion at the 620th meeting of the ILC, especially the interventions of Ago, Bartos, François and Jimenez de Arechaga: YbILC 247-260 (1961-I).

(8) Even as late as 1965 the issue was still on the table and several governments continued to express their dissatisfaction with the decided approach: *see* the statements of Austria and Japan to the Fourth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, UN Doc. A/CN.4/177 and Add. 1 and 2, YbILC 7-8 (1965-II); *see also* the comments of the USA, UN Doc. A/CN.4/186 and Add. 1-7, YbILC 93 (1966-II).

(9) *See* the Report of Fitzmaurice, YbILC 39 (1959-II).

this decision by stating that "in as sense, all rules of interpretation have the character of guidelines since their application in a particular case depends so much on the appreciation of the context and the circumstances of the point to be interpreted" ⁽¹⁰⁾.

The *third* question concerned the very existence or, even, possibility of existence of *customary* rules of interpretation. The members of the ILC favored a negative answer in their interventions. Although a first set of draft articles on interpretation was provisionally adopted by the ILC in 1964, the decision was justified not on the grounds that those provisions codified customary international law, but because the proposed set of articles offered a "good solution" to the problem. The members of the ILC expressed in their statements admiration to Sir Waldock for succeeding in "finding a satisfactory solution" and for "succeeding to pick his way through the jungle of notions on the subject", but *not* for codifying law ⁽¹¹⁾. The problem was summarized by Ruda as follows:

[a]t the present stage of development of international law there did not as yet exist for states any obligatory rules on the subject of interpretation [...] binding upon states. At least, if any rules existed, they were subject to considerable doubt, except for the rule in *claris non fit interpretatio* [...]. Those rules would not constitute a codification of existing law: they would represent proposals for the progressive developments of international law ⁽¹²⁾.

One of the reasons for the inability to single out any customary rules was the difficulty of detecting state practice on the matter. In the words of the Special Rapporteur, "evidence of state practice was difficult to obtain as not much was to be found in publications of state practice which for the most part were content to reproduce the decisions of international tribunals and were not concerned with the interpretation of treaties by States themselves" ⁽¹³⁾. Additionally, at least three different approaches to interpretation existed at that

(10) See YbILC 94 (1966-II).

(11) See the statements of Tabibi and Amado, YbILC 276-277 (1964-I).

(12) *Id.*, at 277.

(13) *Id.*, at 275.

time, supported by comparable portions of doctrine ⁽¹⁴⁾. On the one hand, there was the view that the primary goal of treaty interpretation is to ascertain the intention of the parties (the “intentions” approach). Another view started from the assumption that the intentions of the parties are reflected in the text of the treaty which they have drawn up, and that the primary goal of treaty interpretation is to ascertain the meaning of this text (the “textual” approach). Finally, there were those who maintained that the interpreter must first ascertain the object and the purpose of the treaty and then interpret it so as to give effect to that object and purpose (the “teleological” approach).

The first method favors a liberal recourse to the *travaux préparatoires* and drafting history of the treaty or provision, being regarded as evidence of the original intention of the parties. The second generally insists on the primacy of the text as the basis for interpretation, while at the same time giving a certain place to extrinsic evidence of the intentions of the parties and to the objects and purposes of the treaty as means for correcting or supplementing the text. Finally, the third method is prepared to accept teleological interpretation of the text which goes beyond, or even diverges, from the original intentions of the parties as expressed in the text.

The VCLT finally incorporated two provisions on interpretation, Articles 31 and 32, which strongly support the second approach (“textual” analysis) ⁽¹⁵⁾. It is submitted here that many of the

(14) See the relevant discussion in I. SINCLAIR, *The Vienna Convention on the Law of Treaties* 114-115 (1973).

(15) Article 31 reads as follows:

General rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account together with the context:

doctrinal disputes regarding the content of these provisions, some of which continue to exist today, are emanating from the continuing adherence of a large part of the doctrine to the remaining two approaches to interpretation, the "intentions" and "teleological" analysis. The adoption of the existing set of articles has by no means reduced the usefulness or relevance of the "intentions" or the "teleological" approach in different situational contexts. Therefore, it is essential to always view those two provisions in the light of the described ambivalence experienced by the ILC in performing its task.

The Special Rapporteur of the time was careful not to attribute any customary aura to Articles 31 and 32 ⁽¹⁶⁾. The final choice for the phrasing and formulation of these provisions was a result of drawing inspiration from the work of the previous Special Rapporteurs and for reasons of the wide (although by far not exclusive) acceptance of "textual" analysis by the doctrine and case-law of international tribunals. Article 31 takes as a basic rule of treaty interpretation the primacy of the text as evidence of the intentions of the parties. The starting point and purpose of interpretation is to elucidate the meaning of the text, and not to investigate *ab initio* the intentions of the parties. While not excluding recourse to other indications of the intentions of the parties in appropriate cases, it

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 reads:

Supplementary means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

(16) See the Reports of Waldock of 1964-66, *supra* notes 3 & 7.

promotes the actual text as the dominant interpretative criterion. This general rule is followed by an enumeration of what is understood as “context” of the treaty and of other elements that must be taken into account together with the context: subsequent practice of the parties in the application of the treaty and any relevant rule of international law. Paragraph four of Article 31 admits as an exception to the natural and ordinary meaning rule, for cases in which it is established conclusively that the parties employed a particular term with a special meaning.

Interpretation must take place in “good faith” and the “ordinary meaning” of a term must be evaluated in its context and in the light of the object and purpose of the treaty. The principle of good faith in interpretation, emanating from the general principle of *pacta sunt servanda*, implies that the final result must be appreciated in good faith. According to the structure of Article 31, good faith is not an element to be considered in the evaluation of the ordinary meaning only, but is the general safeguard covering the whole act of interpretation. The expression “ordinary meaning”, invites a linguistic and grammatical analysis, but not *in abstracto*. Words have no inherent or pre-existing meaning. In consequence, the term in question must be examined in the context of the phrase where the term is included. Furthermore, a provision must be read in the context of the whole treaty. In the consideration of the ordinary meaning also the object and purpose of the treaty is relevant, but always within the scope of textual analysis. Teleological interpretation must not take precedence over textual analysis. Once more, the object and purpose will be the test in the light of which the result will be evaluated, and does not constitute an autonomous ground of interpretation.

Although Articles 31 and 32 do not seek to establish a rigid hierarchy in the elements to be taken into account in the act of interpretation, recourse to *travaux préparatoires* is clearly characterized by Article 32 as “supplementary” means of interpretation. According to the commentary of the Special Rapporteur, the rule formulated was carefully balanced so as to allow recourse to the *travaux préparatoires* only for the purpose of determining whether the meaning decided after the application of Article 31 was ambigu-

ous or obscure, manifestly absurd or unreasonable. This formulation seemed to the ILC to be as near as it is possible to get to reconciling the primacy of the text with the frequent and quite normal recourse to the *travaux préparatoires* without any regard for the question whether the text itself is clear ⁽¹⁷⁾. Without characterizing recourse to the *travaux* as “supplementary” and qualifying its use, Article 32 was running the risk of undermining the principle of the primacy of the text as enunciated by Article 31. The exact relationship between the primary and supplementary means of interpretation, however, is still not clear, and the ambiguity is also fostered by the differing conception of the role of preparatory work in the various legal systems of the world. According to Sinclair, to mention one example, the distinction between the two is intended rather to ensure that the supplementary means do not constitute an alternative, autonomous method of interpretation divorced from the general rule ⁽¹⁸⁾.

Many aspects of the content of Articles 31 and 32 remain contentious today. To mention one example, there is the question of whether the principle of “effective interpretation”, often described by the Latin maxim *ut res magis valeat quam pereat*, is encompassed in the rule of Article 31. A large part of the disagreement is owed to the differing understanding of the maxim itself. There is a tendency to equate “effective” with teleological interpretation, although it is usually understood as permitting extensive interpretation of the provision in question. In the discussions before the ILC, the Special Rapporteur tried to distinguish between the two ⁽¹⁹⁾. Effective interpretation must not extend beyond what is expressed or implied in the text itself: the principle when applied should give to the text the maximum of effectiveness, but within the common intention of the parties, as expressed in the text. If the principle of effective interpretation is understood this way, it can be held to be embodied in the requirement of good faith of Article 31 discussed above. According to this view, its application as an additional criterion runs

(17) See YbILC 99 (1966-II).

(18) See SINCLAIR, *supra* note 13, at 116.

(19) See YbILC 60 (1964-II).

the risk of tilting extensive interpretation beyond the meaning of the text itself.

This doctrinal disagreement and others still surface today in various instances and an obvious reason is that the need for approaches not-encompassed in the VCLT has not ceased to exist. Articles 31 and 32 were not reflecting or — even less — “creating” *ius cogens* from which no deviation is permitted ⁽²⁰⁾. Articles 31 and 32 represent only a “working” solution. Situations in which other means of interpretation are needed is imaginable and, actually, are encountered regularly in judicial practice.

In recent case law there is an abundance of explicit statements in which the two provisions are widely referred to as reflecting customary international law. This view has been reiterated in various Panel Reports and Appellate Body decisions in the WTO system ⁽²¹⁾ and supportive evidence for this consideration is drawn from a diversity of post-1969 case-law and literature ⁽²²⁾. In the debate before the ILC, however, the general feeling was that, at the time of drafting, the rules of interpretation enshrined in Articles 31 and 32 did not reflect customary international law ⁽²³⁾. According to the traditional understanding of the sources doctrine, both *opinio iuris* and practice of states (and not only tribunals) are conditions *sine qua non* for the formation of a customary rule of international law. The methodological difficulties in ascertaining practice in terms of the rules on interpretation are particularly pertinent here. How can one tell whether the procedural guidance offered by Articles 31

(20) See, e.g., YbILC 280 (1964-I).

(21) See, e.g. AB Report in the *Gasoline* case, WT/DS2/AB/R, 29 January 1996, at p. 17.

(22) The AB has invoked, a.o., the following material: *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)*, (1994), I.C.J. Reports p. 6 (International Court of Justice); *Golder v. United Kingdom*, ECHR, Series A, (1995) no. 18 (European Court of Human Rights); *Restrictions to the Death Penalty Cases*, (1986) 70 International Law Reports 449 (Inter-American Court of Human Rights); JIMÉNEZ DE ARÉCHAGA, *International Law in the Past Third of a Century* (1978-I) 159 Recueil des Cours 1, p. 42; D. CARREAU, *Droit International* (3è ed., 1991) p. 140; Oppenheim's International Law (9th ed., Jennings and Watts, eds. 1992) Vol. 1, pp. 1271-1275.

(23) Some writers claim that the situation did not change in the 1970s: see, e.g., T.O. ELIAS, *The Modern Law of Treaties* 71 (1974).

and 32 have been “faithfully” followed by a state, a tribunal or a judge? Instead of an answer I will only provide two statements of members of the ILC in the important 1964 session. Shabtai Rosenne, speaking of the ICJ stated that “[i]t was impossible to know by what processes judges reached their decisions and it was particularly difficult to accept the proposition that the *travaux préparatoires* had not actually contributed to form their opinion as to the meaning of a treaty which, nevertheless, they stated to be clear from its text, but which, as the pleadings in fact showed, was not so” (24). De Luna added to this statement by stating that he could safely assert that “no one could claim to know how a judge actually arrived at his conclusions; that question is a completely different one from that of the statement of reasons which normally prefaced the operative part of any judicial decision” (25).

What is troubling here is not the question of whether or not those rules have *really* acquired customary status. The author only points out that contemporary international legal scholarship and the WTO dispute settlement bodies, as will be demonstrated, have shown a remarkable, almost untroubled, ease in proclaiming the customary character of these rules. The objective of this brief digression to the work of the ILC was to demonstrate the ambivalence experienced by the ILC in discussing the topic of interpretation and to underline that the overarching consideration for the final set of provisions chosen was not their normative clarity but rather their relatively non-contentious texture. The present author maintains that many of the proclamations of international tribunals over Articles 31 and 32 can only be viewed in the context of this ambivalence.

3. *Treaty Interpretation in the WTO Framework.*

The “customary rules of interpretation of public international law” have been formally introduced to the GATT/WTO dispute settlement mechanism by means of Article 3(2) of the Understand-

(24) See YbILC 283 (1964-I).

(25) *Id.*, at 285.

ing on Rules and Procedures Governing the Settlement of Disputes (the DSU), agreed in the Uruguay Round of Multilateral Trade Negotiations as Annex 2 of the WTO Agreement (entered into force on 1 January 1995). Article 3(2) reads, amongst others, that the Dispute Settlement system of the WTO serves to “clarify the existing provisions of th[e] [covered] agreements in accordance with customary rules of interpretation of public international law” ⁽²⁶⁾. The adoption of the DSU has been regarded as one of the most significant achievements of the Uruguay Round, since it is believed to have consolidated the progressive move to “rule-oriented” diplomacy in the GATT system, which had started with the earlier codification efforts of the Kennedy and Tokyo Rounds of multilateral trade negotiations. Those previous rounds, in terms of dispute settlement, resulted in a variety of documents trying to institutionalize the resolution of disputes and to establish procedures governed more by law than by power-politics ⁽²⁷⁾. Even the Tokyo Understanding, however, which was the most elaborate of these documents, made no reference to practices or rules of interpretation ⁽²⁸⁾.

(26) The only other instance in which a similar provision has been incorporated in the Agreements signed in the Uruguay Round can be found in Article 17(6) of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, which reads that “[...] the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law”.

(27) See, for example, the Decision of 5 April 1966 on “Procedures under Article XXII” applying to disputes between a developing and a developed contracting party; also the “Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance” of 28 November 1979, and its Annexed “Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement”.

(28) The “instructions” for the Panels were only formulated in general terms. Paragraph 16 of the Tokyo Understanding reads that “a Panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the General Agreement and, if so requested by the CONTRACTING PARTIES, make such other findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2 [GATT]”. Article 6(v) of the Annex reads that “[P]anel reports have normally set out findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations that it has made”.

For the reasons mentioned in the Introduction, the inclusion of the topic of interpretation was essential in the Uruguay Rounds package of agreements for the materialization of this move towards a "judicialized" dispute settlement mechanism. Interpretative practices under GATT 1947 were never codified or institutionalized. Academic writing often criticized Panels for inconsistent application of rules of interpretation and sometimes, indeed, for "culpable disregard" towards customary rules of interpretation of international law ⁽²⁹⁾. Article 3(2) has been hailed as a first step in establishing accountability on the part of the Panels, and also as a crucial link of the WTO with the rules and principles of general and customary international law.

This Section will attempt to review post-1994 WTO Panel and AB Reports from the point of view of interpretative practice. As announced in the introductory Section, my focus will be *less* on whether or not the dispute settlement bodies have applied "faithfully" Articles 31 & 32 VCLT, and *more* on their pattern of argumentation. I will only point out potential consistencies and inconsistencies in the way the rules of interpretation have been invoked in particular cases, and examine the way such variations have been justified or not justified in the terms of the VCLT. For this reason some cases will be studied more extensively than others, not on account of their general importance or interest, but on account of the extent to which they impair or modify such patterns of interpretation.

The 1996 Appellate Body (AB) Report on *US - Standards for Reformulated and Conventional Gasoline* (the *Gasoline* case) ⁽³⁰⁾, described Article 31 of the VCLT as encompassing a "fundamental" and "general rule of treaty interpretation". In the words of the AB:

The "general rule of interpretation" [of Article 31] set out above has been relied upon by all participants and third participants, although not always in relation to the same issue. That

(29) See, a.o., E. MCGOVERN, *Dispute Settlement in the GATT - Adjudication or Negotiation*, in M. Hilf, F.G. JACOBS & E.-U. PETERSMANN (Eds.), *The European Community and GATT* (1985), pp. 73-84, at 80; P.J. KUYPER, *The Law of GATT as a Special Field of International Law*, XXV Netherlands YbIL 1994, pp. 227-257 at 230-232.

(30) WT/DS2/AB/R, 29 January 1996.

general rule of interpretation *has attained the status of a rule of customary or general international law*. As such, it forms part of the “customary rules of interpretation of public international law” which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the Provisions of the General Agreement and the other “covered agreements” of the Marrakech Agreement Establishing the World Trade Organization. That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law ⁽³¹⁾.

This is the first time in the post-1994 history of the world trading system that such an explicit reference is made to customary rules of interpretation of public international law as means of interpreting a GATT provision. One could think that this is hardly surprising development, since it could be viewed as the culmination of process which had started earlier. Indeed in the *First Alcoholic Beverages* case ⁽³²⁾ and the — still unadopted — Report of the *2nd Tuna Dolphin* ⁽³³⁾ case similar explicit references were also made to the relevance of the customary rules of interpretation. The importance of this AB statement, however, rests more on its timing (this was the first AB decision ever) and on the fact that it introduced a new era in trade dispute settlement, in which such statements became the rule and not the exception. As it will demonstrated, all subsequent Panel and AB decisions to date have expressed their adherence to the pertinence of the customary rules of international law in interpreting the WTO provisions.

A first interesting element to notice is the direct reference to Article 31 VCLT as the “source” of these customary rules of interpretation. Although no explicit reference is made in Article 3(2) DSU to the VCLT, the omission is allegedly to be attributed to other reasons than uncertainty of the drafters about where the rules of interpretation of public international law are to be found ⁽³⁴⁾. The

(31) *Id.*, at 17.

(32) *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, 10 November 1987, BISD 34S/83.

(33) See 33 ILM 839 (1994), esp. pp. 853, 890-892, 898.

(34) Kuyper, for example, states that there can be little doubt that the drafters of 3(2) DSU intended it to be an indirect reference to the VCLT, but that the Convention as such could not be referred because several WTO members are

AB, however, was careful *not* to describe Articles 31 and 32 as exhaustive codification of the rules of interpretation of public international law ⁽³⁵⁾. The wording of the text stresses the fact that the “general rule” of Article 31 “has attained” the status of a customary rule. This carefully couched expression refers rather to the gradual process of the formation of a customary norm *after* the drafting of the VCLT, and brings to mind the discussion of the ILC on the matter. The pronouncement, however, is almost untroubled and quick, relying on the legitimizing effect of previous similar pronouncements by international tribunals in various contexts.

Additionally, the Panel seems not to exclude the possibility of resorting to rules of interpretation outside the framework of the VCLT. The passage quoted above stresses that Article 31 “forms part” of the customary rules of interpretation the Panel is directed to apply. Although this phrase can be taken to leave the door open only to Article 32, it could be also taken more extensively to allow some flexibility for the WTO dispute settlement bodies to employ non-VCLT interpretation rules, tailored for more particular WTO needs. In other words, the statement of the AB could be taken to mean that the VCLT is not regarded as a “closed” system from the point of view of interpretation, but more like an “open-ended” one. Such a move would be fully in conformity with the discussions before the ILC, where it was clear that the list of rules of Articles 31 & 32 was not perceived to be exhaustive. This policy would also make sense from a litigation point of view. As mentioned above, the VCLT did not aim at providing a set of preremptory rules of interpretation, but rather a set of — residual — principles that could be resorted to in the absence of an agreement among the parties as to the method to be followed. The underlying *rationale* is that particular contexts might necessitate different or additional rules of interpretation to accommodate particular needs.

not parties to it (e.g. the US) or cannot become party to it (e.g. the EC); see KUYPER, *supra* note 28, at 232.

(35) Cf. PETERSMANN, who seems to suggest that the statements in Panel and AB decisions “explicitly recognized Articles 31 and 32 of the 1969 Vienna Conventions on the Law of Treaties as authoritative codification of the ‘customary rules of interpretation of public international law’”; see Petersmann, *supra* note 1, at 111.

It is astonishing, however, that most subsequent Panel and AB decisions have insisted in presenting variations in their interpretative practices (sometimes even “innovative” ones) as always in conformity with those two articles of the VCLT. The *Gasoline* AB report offers the first example of this attitude in relation to the contentious principle of “effective interpretation”.

The question of interpretation was raised in the *Gasoline* AB decision in connection with Article XX(g) GATT, and especially in respect of the meaning of the term “measures”, as used both in the *chapeau* of Article XX and in paragraph (g) of the same Article. The question was whether this term referred to the entire Gasoline Rule adopted by the USA, or only to the particular provisions dealing with the establishment of baselines for domestic refiners, blenders and importers. The issue, more particularly, was whether the term “measures” in Article XX refers only to the provisions of the Gasoline Rule which were found as discriminatory under Article III (to which Article XX provides an exception), or to the Gasoline Rule as a whole. The Panel favoured the first solution in its Report. The AB, by underlining the literal meaning of the term “measures”, found that the Panel has erred in concluding that the term “measures” refers only to the discriminatory provisions. The AB disapproved of the interpretation of the Panel as too restrictive, and as ignoring the “textual” analysis requirement imposed by Article 31 of the VCLT. We must note that the more restrictive analysis of the Panel, based on previous Panel practice, drew its interpretation from the relationship between Articles III and XX: the part of the Gasoline Rule seeking justification under Article XX was naturally only the provisions held inconsistent with Article III and not the whole Rule. In effect, the AB did not really explain why textual interpretation justified the broader interpretation of the term “measures”, especially when placed in context and in the light of the object and purpose of the Agreement as a whole, but not the more restrictive one. This has led some commentators to reproach the AB for its decision ⁽³⁶⁾.

(36) See, e.g., P. PESCATORE, *The new WTO Dispute Settlement Mechanism*, manuscript on file with author, to be published in October 1997 in the *Proceedings*

The AB used once more the primacy of “textual” analysis in interpretation in clarifying the meaning of the term “relating to”, also contained in Article XX(g). It emphasized that, in other paragraphs of the same article, other expressions were chosen by the drafters in order to specify and convey different meanings and intentions (expressions such as “involving”, “necessary” etc, were used). A few pages later, while discussing the meaning of the various terms apposed in the introductory provisions of Article XX, it construed the different terms used as being interrelated instead of as intending to convey different meanings. This conclusion was based on the ground of the object and purpose of Article XX (“teleological analysis”), instead of the “textual” analysis favoured previously ⁽³⁷⁾.

Additionally, in interpreting the *chapeau* of Article XX, the Panel dealt with the principle of “effective interpretation”. It maintained that one of the “corollaries” of the general rule of Article 31 is that interpretation must give meaning and effect to all terms of the treaty and that “an interpreter is not free to adopt a reading that would result in reducing all clauses or paragraphs of a treaty to redundancy or inutility” ⁽³⁸⁾. The principle of “effective interpretation” is presented here as a necessary part of the rule of Article 31, and not as a supplementary customary rule of interpretation. In light of the discussion of the ILC in Section two above, it is doubtful whether this analysis of Article 31 is compatible with the one which finally prevailed before the ILC. Unfortunately the Panel did not further elaborate on the relationship between “textual” and “effec-

of the Conference on Regional Trade Agreements and Multilateral Rules After the Uruguay Round, Liege, 3-5 October 1996, at p. 20.

(37) See, in this respect, the comments of PETERSMANN, *supra* note 1, at 115; See, generally on the case, D. PALMETER, *The WTO Appellate Body's First Decision*, 9 Leiden JIL 1996, pp. 337-360; J. WAINCYMER, *Reformulated Gasoline Under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora out of a Chapeau?*, 18 Michigan JIL 1997, pp. 141-181; E. ROBERT, *L'Affaire des Normes Américaines Relatives à l'Essence - Le Premier Différend Commercial Environnemental à l'Épreuve de la Nouvelle Procédure de Règlement des Différends de l'OMC*, RGDDIP 1997-I, pp. 91 et seq.; C. FONG, *WTO: Panel Decision on United States Standard for Reformulated and Conventional Gasoline*, Colorado JIELP 1996, pp. 21-25.

(38) See the AB Report in the *Gasoline* case, *supra* note 29, at p. 23.

tive analysis", and the limits the former poses on the latter in the context of Article 31. "Effective interpretation", in this sense, must not go beyond what is expressed or implied in the text itself.

If potential discrepancies in the application of Articles 31 and 32 can be found in the *Gasoline* case, a lot more food for thought is offered by the next reported case, namely the Panel and AB Reports on *Japan - Taxes on Alcoholic Beverages* (the *Beverages* case) ⁽³⁹⁾. In this case, the Panel made several comments on the topic that are begging the attention of the commentator.

The first statement, under the heading "General Principles of Interpretation" ⁽⁴⁰⁾, declared that Article 3(2) DSU "codifies [a] previously established practice" of Panels interpreting the GATT "in accordance with" the VCLT ⁽⁴¹⁾. The Panel based this conclusion on the practice of past cases, including the first *Alcoholic Beverages* case ⁽⁴²⁾ and the *Gasoline* AB decision. It also noted that there was no disagreement among the parties to proceed on this basis. The verb "codifies", used in the Report, especially in the light of the special meaning it has acquired in Article 15 of the Statute of the ILC, signifies the process of putting in written form an existing norm of customary international law. Although the present paper has not examined Panel practice under GATT 1947, there is a fair amount of scepticism amongst qualified commentators whether the practice under GATT 1947 could realistically be held to be in accordance with Articles 31 and 32 of the VCLT ⁽⁴³⁾. This critique finds its basis primarily at the excessive attention paid to the importance of the *travaux préparatoires* in interpreting GATT provisions in the first and later years, but also in the general tendency of Panels not to provide sufficient reasoning for their findings.

A second statement concerns the precedential value of adopted Panel Reports. In a conclusion that was subsequently overturned by

(39) WT/DS8/R, WT/DS10/R and WT/DS11/R, 11 July 1996.

(40) *Id.*, paras. 6.7. *et seq.*

(41) *Id.*, at para. 6.7.

(42) *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, 10 November 1987, BISD 34S/83.

(43) See, a.o., KUYPER, *supra* note 28, at 229; MCGOVERN, *supra* note 28, at 79.

the AB and subsequent cases (⁴⁴), the Panel claimed that Reports adopted by the GATT CONTRACTING PARTIES constitute “subsequent practice” by virtue of the decision of the CONTRACTING PARTIES to adopt them (⁴⁵). According to the Panel, institutional recognition of this characteristic of adopted Reports is provided by Article I(b)(iv) GATT 1994.

A third issue is related to the value of the *travaux préparatoires* in the process of interpretation. In footnote 87 of the Report, the Panel, reversing many years of GATT 1947 practice, stated that “according to Article 32 VCLT recourse to supplementary means of interpretation is required only as an exception in specific circumstances”. From the one extreme, of over-emphasizing the importance of the *travaux*, which was the main polemic against the interpretative practices of GATT 1947 (⁴⁶), the Panel moved to the opposite extreme of relegating the *travaux* to a purely secondary role. A single extract from the ILC debate has been furnished as evidence for this move. Section Two above has demonstrated that the ambivalence experienced by the ILC when discussing this particular issue places the answers to such problems to a far more relative context than the one the Panel wished to present here.

Lastly, the *Beverages* Report also discussed once more the relationship between Article 31 and the principle of “effective interpretation”. In paragraph 6.22, and by quoting the relevant statement of the *Gasoline* AB, the Panel stated that its approach “is in conformity with the principle of ‘effective treaty interpretation’ as laid down in the ‘general rule of interpretation’” of the Vienna Convention. The same statement is made even more strongly in the AB decision, where the AB went as far as to accept that Article 31 necessitates the application of the *maxim ut res magis valeat quam pereat* (⁴⁷). This insistence of the Panel in invoking the principle of “effective interpretation” consolidates what could be a particular preference of the WTO dispute settlement framework towards this

(44) See pages 12-15 of the AB *Beverages* decision, *supra* note 38.

(45) See para. 6.10 of the Report, *supra* note 38.

(46) See McGovern, *supra* note 28.

(47) *Beverages* AB, *supra* note 38, at p. 11.

principle, despite substantial doctrinal disagreement over its footing within the text of Article 31. This preference, however, is presented as being fully in compliance with the text of Article 31, although paragraph 6.22 of the Panel Report does not elaborate on this relationship. The AB *Beverages* decision based again its conclusion solely on a single quotation of the 1966 discussions before the ILC ⁽⁴⁸⁾ and, more importantly, on the legitimizing precedential role of the *Gasoline* case. This is another interesting emerging pattern to note: once an issue has been dealt with by a previous AB decision, notwithstanding its potential inconsistency with the VCLT, it is being treated by subsequent cases as generally settled, non-negotiable, but also in consistency with the VCLT. As we will later see, the principle of “effective interpretation” is a recurrent theme in this respect.

To return to the *Beverages* case, the Panel also paid tribute to the customary nature of Articles 31 and 32 VCLT, but the wording used is far less careful than the one in the *Gasoline* AB, by stating that the customary rules of interpretation of public international law are “those incorporated” in the provisions of the Vienna Convention ⁽⁴⁹⁾. Once more, the *Beverages* AB remedied this “slip” by returning to the *Gasoline* AB statement and faithfully repeating its exact wording, extending the content even over Article 32 of the Vienna Convention. The Panel, however, confirmed in general the pattern established by the *Gasoline* AB by presenting an even more elaborate exposition of the way the “customary rules of interpretation” must be applied in the GATT context:

[t]he starting point of an interpretation of an international treaty, such as the GATT 1994, in accordance with Article 31 VCLT, is the wording of the treaty. The wording should be interpreted in its context and in the light of the object and purpose of the treaty as a whole and subsequent practice and agreements should be taken into account. Recourse to supplementary means of interpretation should be made exceptionally only under the conditions specified in Article 32 VCLT ⁽⁵⁰⁾.

(48) See footnote 21 of the AB decision.

(49) See para. 6.7 of the *Beverages* Report, *supra* note 38.

(50) See para. 6.10 of the *Beverages* Report, *supra* note 38; see also pp. 10 of the AB Report for a similar statement.

In the *Beverages* case, the question of interpretation arose especially in relation to the meaning of Article III:2 GATT. The Panel presented its analysis as an exemplary application of the rules of interpretation. In the three following paragraphs, the conscious application of the three “steps” of Article 31 is emphasized repeatedly and the reader is reminded what s/he witnesses a “proper” process. The “religious” zeal of the invocation, is another recurrent characteristic in subsequent Reports, and it goes as far as to declare the analysis of the ILC on interpretation, with reference to the *travaux préparatoires*, “relevant even in the context of preparatory work of domestic legislation” ⁽⁵¹⁾. The Panel distinguished between the provisions of GATT Article III:1 and III:2 with the help of “textual analysis”, and the contextual element was subsequently invoked in examining the relationship between Articles II and III. The result of this consideration was then viewed in the light of the purposes of the two Articles; the interim conclusion reached was that the first and second sentences of III:2 establish two distinct legal relationships. Similar explicit references have followed in the remaining paragraphs, where the Panel interpreted the way in which each one of the paragraphs will be applied.

The *Brazil - Measures Affecting Desiccated Coconut* is the case which followed next (the *Coconut* case) ⁽⁵²⁾. The Panel and AB exhibited an interesting consistency with the previous in its pronouncements and the invocation of Article 31. Also here, however, the Panel can be held to have innovated while operating under the “umbrella” of Articles 31.

The Panel had to examine, among others, whether Article VI GATT 1994 (relating to countervailing duties) is susceptible of interpretation and application independently of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement), although it was not invoked by the Philippines as applicable law. In particular, the Panel had to interpret the term “this agreement” included in 32.3 SCM Agreement, and find out whether it includes

(51) See footnote 87. *Id.*

(52) *Brazil - Measures Affecting Desiccated Coconut*, Report of the Panel, 17 October 1997, WT/DS22/R.

Article VI GATT. What differentiated this case from the previous two is that, after proceeding with a standard textual, contextual and object and purpose analysis of the provision, the Panel applied an additional tool of interpretation, namely the “consequences” of the conclusion reached by the first two criteria ⁽⁵³⁾. It is interesting to notice that the relevance of the “consequences” test is neither investigated nor is it held to fall directly under the provisions of Article 31 and 32. It later appears, however, that the “consequences” test is directed at evaluating, in a final stage, whether the results of the first two criteria would be “absurd or unreasonable” in the light of Article 31 VCLT ⁽⁵⁴⁾.

The point was raised by the Philippines, which argued that there would be two “absurd or unreasonable” consequences of the interpretation of 32.3 suggested by Brazil. The first would be that to deny the Philippines access to the WTO dispute settlement system, with respect to a duty imposed as a result of a determination made after the entry into force of the WTO Agreement, if that determination was the result of an investigation initiated pursuant to an application made before the entry into force of the WTO Agreement. The second was that some WTO members could allegedly be left without a forum to pursue their rights under either the GATT or the WTO systems with respect to countervailing measures imposed as a result of investigations initiated pursuant to applications made before the entry into force of the WTO Agreement. After applying the “consequences” test the Panel satisfied itself that the results would not be such and decided that Article VI of GATT 1994 does not constitute applicable law in the case.

The AB decision ⁽⁵⁵⁾ also applied textual, contextual and object and purpose analysis of Article 32.3 SCM Agreement ⁽⁵⁶⁾, but it did not demonstrate the same preference towards the “consequences” test. In fact the AB ignored the point entirely and reached its conclusions by applying the standard *Gasoline* AB method of Article

(53) *Id.*, at para. 262 *et seq.*

(54) *Id.*, at paras. 262-281.

(55) WT/DS22/AB/R, 21 February 1997.

(56) *Id.*, pp. 15 *et seq.*

31, although without any reference to the principle of "effective interpretation". It responded to the claim of the Philippines by stating that

[w]e agree with the panel that the complaining party in this dispute, the Philippines, had legal options available to it and, therefore, was not left without a right of action as a result of the operation of Article 32.3 of the SCM Agreement... (p. 20). In light of the above, we believe that it is not necessary to determine whether applying Article VI of the GATT independently of the SCM Agreement would be more onerous than applying them together ⁽⁵⁷⁾.

This is one more emerging pattern to observe, namely that, similarly to the *Beverages* case, the tendency of the AB to act as a regularizing factor in terms of interpretative process, ushering the Panel and the parties back to the well trodden path of the three stage analysis of Article 31 and 32 of the VCLT.

The following case, *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear* case (the *Underwear* case) ⁽⁵⁸⁾, was quite an unexceptional case from the point of view of interpretation procedures invoked by the Panel, but not uninteresting for our purposes, for two reasons. In the *Underwear* case, Costa Rica claimed that US has violated a series of obligations under Articles 2, 6, and 8 of the *Agreement on Textiles and Clothing* (the ATC Agreement) by imposing a unilateral quantitative restriction on cotton and man-made fibre underwear. The Panel started by investigating "General Interpretative Issues" ⁽⁵⁹⁾, repeating that the customary rules of interpretation of public international law "are embodied" in the text of the Vienna Convention on the Law of Treaties ⁽⁶⁰⁾, by referring back to the *Gasoline* AB. This is the first interesting statement to note. If the *Gasoline* AB could be held to have left some room for rules of interpretation other than the ones embodied in the VCLT to be invoked in the process ⁽⁶¹⁾, the

(57) *Id.*, pp. 20-21.

(58) WT/DS24/R, 8 November 1996.

(59) *Id.*, at paras. 7.6 *et seq.*

(60) *Id.*, at para. 7.17.

(61) *Supra* note 29.

Underwear Panel closed this opening and kept no doubt that the enumeration of Articles 31 & 32 is exhaustive. The “open-ended” approach suddenly re-appeared in the *Hormones* cases ⁽⁶²⁾, while the last reported case (the *TRIPs* case) regressed to the wording of the *Underwear* case ⁽⁶³⁾.

Another point concerns the principle of “effective interpretation”. The Panel laid out the procedure it would follow in an exemplary way: it would first deal with the “ordinary meaning to be given to the terms of the treaty in their context”, then the purpose and, finally, good faith. An interesting omission, however, is again the one to the principle of “effective interpretation”. The principle was invoked by the US in its pleadings, in respect of the issue of backdating the effectivity of a transitional safeguard measure taken under Article 6.10 of the ATC ⁽⁶⁴⁾. Article 6.10 ATC was indeed silent on the question of the initial date from which the restraint period should be calculated, and the question before the Panel was whether the silence of the ATC in this regard should be interpreted as prohibition or permission of backdating. The US argued that, according to the principle of “effective interpretation”, transitional safeguards and restrictions must be permitted to have an effective date as of the date of the request for consultations, since it was essential to the effective application of transitional safeguard as an adjustment mechanism. Any contrary position would make ATC-consistent transitional safeguards ineffective. The Panel finally conceded the point to the US, but not on the basis of the principle of “effective interpretation”. In fact, the principle was never invoked or even mentioned by the Panel. Given the silence of Article 6.10 ATC

(62) See *EC - Measures Concerning Meat and Meat Products (Hormones)*, Complaint by Canada, WT/DS48/R/CAN, 18 August 1997, at para. 8.28; *EC - Measures Concerning Meat and Meat Products (Hormones)*, Complaint by the United States, WT/DS26/R/USA, 18 August 1997, at para. 8.25; in both cases the Panels hold that Articles 31 and 32 “form part” of the customary rules of interpretation of public international law.

(63) See *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* (the *TRIPs* case), WT/DS50/R, 5 September 1997, at para. 7.18.

(64) *Supra* note 57, at paras. 5.220 & 5.221.

on the point, the Panel decided the point by turning to Article X:2 GATT as the applicable provision.

The AB rejected the Panel reasoning and stated that the answer to the problem can be found within the text and context of Article 6.10 ⁽⁶⁵⁾. By emphasizing textual and contextual elements the AB finally concluded that backdating is not prohibited under Article 6.10 ATC. Applying this sort of analysis it overturned the decision of the Panel, but without again invoking the principle of “effective interpretation”. The same omission of the principle can be found in both *Hormones* cases ⁽⁶⁶⁾, where the Panels again invoked the *Gasoline* case standard pronouncement on interpretation, but left aside the part on “effective interpretation” as a corollary of Article 31. The principle was absent also in the *Wool Shirts* ⁽⁶⁷⁾ case and the *TRIPs* case ⁽⁶⁸⁾. Although it invoked the *Gasoline* and *Beverages* cases as a guiding practice, it did not invoke the importance attributed to this principle as a part of Article 31 ⁽⁶⁹⁾. The principle of “effective interpretation” returned not too much later with the *Periodicals* case ⁽⁷⁰⁾. The Panel stated that “as the AB has *repeatedly* pointed out, one of the corollaries of the general rule of interpretation’ in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility” ⁽⁷¹⁾. This “on-and-off” approach to the principle is quite perplexing and exposes the DS bodies to justified (in)consistency critique, and gives rise to the question of whether the “forgetfulness” is dictated by reasons of convenience.

(65) See WT/DS24/AB/R, p. 13 et seq.

(66) *Supra* note 61.

(67) *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, 6 January 1997.

(68) *Supra* note 62.

(69) *Supra* note 66, at para. 7.22.

(70) *Canada - Certain Measures Concerning Periodicals*, WT/DS31/R, 14 March 1997.

(71) *Id.*, at para. 5.17 (emphasis added).

In the *Periodicals* case the Panel also confirmed the reading of the hierarchy between Articles 31 and 32 performed by the ABs in the *Gasoline* and *Beverages* cases. The Panel stated:

Canada's narrow reading [...] is supported only by Canada's own interpretation of the drafting history, which is contested by the United States. Since, according to Article 32 of the Vienna Convention, the preparatory work of a treaty is merely a supplementary means of interpretation to be relied upon in cases where the terms of the treaty, taken in their context and in lights of its object and purpose, are ambiguous or obscure, or lead to a manifestly absurd or unreasonable result, we need not take the drafting history into account on this particular point ⁽⁷²⁾.

A last thing to note in the *Periodicals* case is that the Articles 31 and 32 analysis is invoked only in respect of *some* aspects of the case. While it is used to examine the applicability of Article III GATT to the case, it is not invoked when the meaning of some of the provisions of this Article, such as Article III:8 ⁽⁷³⁾. The same could be said also for other cases, such as *Wool Shirts*, where after the opening statement on interpretation, the principles of textual and contextual analysis faded to the background and were never invoked again in the procedure. The same story is repeated by the *Wool Shirts* AB ⁽⁷⁴⁾, where there is no explicit invocation of the principles of interpretation, although they were invoked by both parties in the proceedings. Once more, I do not mean to imply that the Panels have not respected those rules in the *Findings* of those cases. However, they do seem to have ceased being central in the argument once the discussion revolves around particular problems. The rules of interpretation are used in the opening paragraphs but their absence from the operative part of the *Findings* is again an issue that begs the attention of the commentator. Again the "on-and-off" approach in the style begs the question of whether the omission is culpable.

(72) *Id.*, at para. 5.29.

(73) *Id.*, at paras. 5.40 et seq.

(74) WT/DS33/AB/R, 25 April 1997.

4. *Concluding Remarks.*

Having examined recent cases, it is tempting to try and extrapolate some conclusions about the relationship between the customary rules of interpretation public international law and interpretative practices in the WTO dispute settlement mechanism, as well as the role of this relationship in the argumentative practice before this mechanism. The first thing to notice concerns the — untroubled — ease with which the customary nature of Articles 31 and 32 have been proclaimed by the *Gasoline* AB and have subsequently become standard feature of Reports. Gone are the methodological anxieties and ambivalences of the ILC: it is now clear to everyone that these rules have attained the customary status. The same certainty exists for the content of these articles and the hierarchy between them. This is particularly interesting in the light of the fact that other bodies have reached different interpretations of the principles embodied in Articles 31 and 32. For example, the first — and only so far — NAFTA Panel Report invited a more liberal use of the *travaux préparatoires* in its deliberation ⁽⁷⁵⁾. The Panel noted “the admissibility of recourse to supplementary means of interpretation, including preparatory work, pursuant to Vienna Convention Article 32 *in order to confirm the meaning* resulting from the application of the rule in Vienna Convention Article 31” ⁽⁷⁶⁾, and then went on to use preparatory work in its decision ⁽⁷⁷⁾.

Another point concerns the scope of the “customary rules of interpretation of public international law”. The first AB Report seemed to share the feelings of the ILC on the issue, namely that the enumeration of Articles 31 & 32 VCLT is by no means an exhaustive list, and that it would be possible for the WTO DS bodies to resort to additional rules of interpretation outside the context of the VCLT. Indeed, it could be possible for one to find established additional (customary or not) rules of interpretation, especially in particular

(75) See *NAFTA - Arbitral Panel Established Pursuant to Article 2008 in the Matter of Tariffs Applied by Canada to Certain US-Origin Agricultural Products*, 2 December 1996, Secretariat File No. CDA-95-2008-01.

(76) *Id.*, at para 121, emphasis added.

(77) *Id.*, at para 176.

fields of international practice. In subsequent cases this perception was narrowed down to the extent that in, for example, the *Underwear* and *TRIPs* cases, the customary rules of interpretation of public international law are equated with or exhausted in Articles 32 and 32 VCLT.

A parallel trend is an effort by the Panels and ABs to present their interpretative policy pronouncements as always in accordance with those two Articles of the VCLT. Two manifestations of this phenomenon have been described in this paper. First, the incorporation of virtually identical pronouncements on the interpretative procedure to be followed in virtually every Report issued. These pronouncements gradually take a “standard” form and vocabulary, starting with the *Gasoline* AB and repeated with great consistency in subsequent cases. The second manifestation is a tendency to present elements of the procedure, not explicitly mentioned in Articles 31 and 32, as being in accordance with or justified by those two articles. We have seen this in many instances involving the principle of “effective interpretation”, or the “consequences” test employed in the *Coconut* case. This is a very interesting development, given the fact that the VCLT does allow agreed deviations from Articles 31 & 32. These two articles are by no means preremptory: any international agreement may establish rules of interpretation dictated by the specifics of its subject-matter. It is also possible that rules whose endorsement by the VCLT is controversial, but still remain influential in international litigation (such as the one of “effective interpretation”), could be of great use in a system such as the WTO. In spite of all these considerations, the *Gasoline* AB and subsequent cases have tended to explain their interpretative policy in terms of the VCLT. The last puzzling thing in this respect is that those “non-explicit” elements of Article 31 and 32 appear only in some cases but not in others, they seem to have an “on-and-off” effect, which invites speculation as to the reasons for the omission or invocation.

One can also not fail to notice the “regularizing” effect of the AB and the influence of AB precedents. In more than one instances the AB has “corrected” pronouncements on interpretative procedure made by Panels. Additionally, the statements of the *Gasoline* AB

have been repeated with “religious” zeal and regularity by subsequent cases.

Finally, references to the rules of the VCLT are usually limited to the introductory parts of the *Findings* of every particular case. Once the Panel or AB get involved in dealing with a particular claim, two things happen. Sometimes the criteria of VCLT reappear to justify the decision of the Panel, and sometimes they fade to the background to such an extent that they seem as they have ceased being a part of the argument. One could say that the latter is to be expected since, as mentioned in Section One, rules of interpretation are rules of procedure: once the procedure is established, they remain as a guiding light in the mind of the interpreter. What is curious, however, is that these principles constitute the “thread” of the argument only sometimes and not in others. These latter cases often raise the question as to whether these interpretative principles have been substantially taken into account.

Is there an overall conclusion to be drawn from all the above? As mentioned, it is difficult at this early stage to discern anything more than emerging patterns of interpretative argument. These emerging patterns seem to suggest that Articles 31 and 32 VCLT will probably continue being invoked in following cases with the same regularity. An essential characteristic, however, is that although the practice has not been uniform, as the previous pages demonstrate, it has been presented as such by the Panels and AB. At the same time, the repeated invocation of these Articles will set the tone for both the pleadings/ arguments of the parties and the decisions of the Panels and AB. In other words, every argument put forward must at least invoke these Articles as its guiding principle. This will create a uniform language, vocabulary, style, fashion, and structure of presentation of argumentation.

This uniformity is the element that elevates the establishment of rules of interpretation to such a desirable stage in the development of a legal system by contemporary mainstream legal scholarship. This uniformity is considered to be beneficial because, the argument goes, it creates limits to the discretion of the interpreters and increases accountability. This is not the moment to engage in a general discussion on the relative merits of the liberalist conception

of the function interpretation in a legal system. This would be the topic for a separate essay and would exceed the scope of this research paper ⁽⁷⁸⁾. I will limit myself in pointing out that uniformity in language and style says little about whether these principles are being applied “faithfully” or “correctly”. Neither does it say anything about whether the “correct” meaning of the provision in question has been conveyed, or about whether “justice” has been served. In almost every case there is a considerable part of doctrine which raises exactly such claims, often for good reason. Such principles can act as a legitimizing factor for virtually every decision taken, since it can be presented under the veil of the application of generally accepted rules of interpretation.

Scholarly critique of every decision is not necessarily a sufficient check-and-balance to this process. Uniform language and uniform patterns of argumentation, although perceived to contribute to legal certainty and predictability, have an unavoidably excluding role for considerations not endorsed by this uniform language. Such excluded considerations could be instrumental in claims for justice and fairness in the system. Interpretation has always been a complex political/ subjective exercise which, although can be guided by principles, can never be reduced to a mechanical revelation of hidden meaning. Since the 1930s and the critique of legal realism, generations of jurists have attacked the notion of legal determinacy and the possibility of consistently extracting the “real” meaning of legal rules ⁽⁷⁹⁾. The critique of determinacy, well footed in foundational principles of linguistics, and advanced further with the writing of the Critical Legal Studies movement and the New Approaches to International Law during the last two decades, has managed severe blows to the possibility of a formalist “objective” interpretation ⁽⁸⁰⁾.

(78) This has been done competently by, a.o., D. KENNEDY, *The Turn to Interpretation*, 57 Southern California Law Review 1985, pp. 251-275.

(79) For example, see the critique of SIR H. LAUTERPACHT in *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, in E. LAUTERPACHT (Ed.), *International Law, Being the Collected Papers of Hersch Lauterpacht*, 1977, vol. 4, at 410 et seq.

(80) For a compelling argument taking the point much further, see Martti KOSKENNIEMI, *From Apology to Utopia - The Structure of International Legal Argument* (1989).

This short research paper does not do justice to the complexity of the role of rules of interpretation in the structure of contemporary legal argument. Its objective has been to study recent cases before the WTO dispute settlement mechanism from the point of view of interpretative practices. It is hoped, however, that it firmly puts the question of whether the notion of interpretation, and the rhetoric about its positive effects, advocated by the WTO dispute settlement mechanism and its supporters, runs the risk of over-simplifying and concealing this complexity.

GABRIELLA VENTURINI

COMMENTS

1. The WTO dispute settlement mechanism has been a subject of tremendous academic interest due especially to the significance of a system expressing a gradual jurisdictionalization of forms of cooperation which, under GATT 1947, had never proceeded beyond conciliation. The GATT 1947 dispute settlement system, however, was quite significant, especially for the European Community with respect to its participation in GATT disputes. Indeed, it was through participation in dispute settlement procedures within the framework of GATT 1947 that the European Community succeeded in asserting its autonomy in foreign relations and its international legal personality earned widespread recognition. In addition, the dispute settlement mechanism took on significance as a negotiating tool. We know, in fact, that the GATT 1947 Contracting Parties often voluntarily turned to dispute settlement proceedings to bring up problems to be discussed around the trade bargaining table, and treated the panel recommendations as elements of negotiation. This practice was characteristic of the long Uruguay Round negotiations in particular, and certainly will not disappear because the World Trade Organization is itself a universal negotiating forum whose framework continues to be a setting for negotiation on well-known issues and new topics.

It has been said that the practical application of the WTO dispute settlement system has witnessed broader participation by its contracting members than the GATT 1947 mechanism, which was utilized primarily by industrialized nations. Even though some Asian and many Latin American countries (who were already fairly active in GATT 1947) have made use of the dispute settlement system, I would hesitate to affirm that this wider use is qualitatively signifi-

cant. What is significant, in my opinion, is rather the general use of appeal by WTO Members who are unhappy with the conclusions of a panel; furthermore, I believe it is worth calling attention to the skill with which the Appellate Body has operated so far, reshaping what was probably indispensable to appease States that challenge a panel's conclusions, but at the same time, as Professor Mengozzi pointed out, seeking to safeguard legal certainty and the predictability of the outcomes as much as possible.

2. Javier Fernández Pons' study on "Self-Help and WTO" highlights how the WTO system makes a clear break with the GATT 1947. Although GATT Article XXIII had always contemplated the possibility to authorize a contracting party to suspend the application of a concession or an obligation under the General Agreement, this was only done on one occasion. Thus, in the GATT 1947 experience, the authorization of the contracting parties to inflict countermeasures fell into disuse, while more and more frequent were cases where unilateral measures were taken and other GATT provisions were improperly applied. For example, Article XIX was used to justify, under the pretext of safeguards, trade restrictions which were really unilateral self-help measures. On the contrary, in the WTO, and especially in the Understanding on the Rules and Procedures governing the Settlement of Disputes (DSU), the picture is completely different. Not only are the authorized countermeasures regulated in great detail and subject to certain prerequisite conditions; the Understanding also establishes which kind of countermeasures may be taken, and specifies that they may not be used as a punishment but only as a means of compensation. Thus, in the WTO, there is a renunciation to the principle of self-help. Recourse to unilateral measures beyond what is specifically provided for in the organization's dispute settlement system is not permitted.

In the WTO dispute settlement framework, the United States continues to play a predominant role — as it previously had done under GATT 1947. To this regard, the application of U.S. Trade law is of particular note, especially the famous — and infamous — Section 301 of the Trade Act. I won't dwell on this aspect because I believe that countermeasures in response to breaches of interna-

tional obligations falling within the reach of Section 301 (in its original version) can be administered in conformity with WTO and DSU obligations. The legislative changes adopted by the United States in order to implement the Uruguay Round Agreements indeed confirm this. The United States has, in fact, for many years and within the GATT 1947 framework utilized Section 301 of the Trade Expansion Act of 1974 (that is, the original Section 301) in relation to breaches of GATT 1947 rules committed by other contracting parties. The changes introduced by the Omnibus Trade and Competitiveness Act of 1988 (i.e. the two new parts known as Special 301 and Super 301) — which contemplate the possibility, or sometimes the obligation, to take action against countries which don't allow access to their markets — arose, in part, just out of the U.S. Government's frustrations at its overall failure in the administration of Section 301 for the adoption of countermeasures in response to breaches of GATT 1947. The unilateral measures undertaken in reaction not to breaches of international law but to behavior or various practices deemed "unreasonable" (to quote the U. S. legislation) is the subject of Brett Williams' study entitled "Non-Violation Complaints", and will be discussed by Professor Andrea Comba.

In keeping with the subject of self-help at hand, it is fitting to emphasize the importance of measures necessary to protect essential national security interests contemplated by GATT Article XXI. Of less importance, perhaps, are other matters not contemplated by the provisions of WTO agreements, i.e. the possibility to adopt unauthorized unilateral countermeasures in response to violations that are not breaches of WTO law. Even those countermeasures should, in fact, consist in measures for which no treaty obligations are provided: in this case I think that a narrow interpretation should be followed. In the GATT framework the same retaliatory measures, though lawful *per se*, may spark action based on Article XXIII. GATT 1947's Article XXIII introduced for the first time in trade matters the possibility to make recourse to a dispute settlement system to challenge situations or provisions which were *not* unlawful and, in fact, was frequently invoked in GATT 1947 practice.

With respect to the adoption of self-help measures, Javier

Fernández Pons also describes and analyzes the transitional period granted to developing countries for the implementation of commitments undertaken in the WTO, which serves to compensate for the elimination of the generalized system of preferences. Thus, since some countries are allowed a longer time frame in which to implement their commitments, until that implementation is complete, reliance on unilateral self-help measures could be considered still possible. This same situation could apply also to those agreements (such as the Agreement on Trade Related Aspects of Intellectual Property Rights, or TRIPS) which provide for a postponement with regard to dispute settlement. Of course, the interpretation in good faith of obligations arising from the agreement implies that WTO members should refrain from any unilateral measures that might obstruct the implementation of the agreements themselves, even when a delay in implementation is permitted.

Two other cases in which the doctrine has suggested that unilateral self-help measures may play a residual role are also worth mentioning. The first hypothesis regards the total failure of the WTO dispute settlement system, in which case "*rebus sic stantibus*" could justifiably be invoked; however, such an event is highly unlikely since the system not only functions but also is widely utilized by the Organization's members. More to point is a second hypothesis: recourse to unilateral countermeasures in the case of a breach of obligations *erga omnes*. In fact, with regard to this, certain States have already taken a firm stance. However, even here it is unlikely that a case could be kept away from the scrutiny of panels or the judgement of the Appellate Body.

3. Turning now to the paper by Thomas Skouteris entitled "Customary Rules of Interpretation of Public International Law and Interpretative Practices in the WTO Dispute Settlement System," he has the merit of having highlighted the new element of invoking customary international law in the interpretation of the WTO Agreements. The 1969 Vienna Convention on the Law of Treaties may be applied to this convention as regards States which are party to both. In addition, panel and Appellate Body "case law" affirms without any uncertainty that Articles 31 and 32 of the Vienna Convention,

which deal with criteria for the interpretation of treaties, can be considered as customary international law. This response not only simplifies interpretation in cases involving important WTO members (such as the United States) that are not party to the 1969 Vienna Convention, but likewise constitutes the indispensable interpretative link between all the instruments of the WTO system. In fact, Article 31.2(a) of the Vienna Convention may be understood as referring specifically to the “constellation” of multiple agreements, declarations, and other instruments which comprise and complete the legal patrimony of the WTO. Thus, the correspondence to customary international law of Articles 31 and 32 of the Vienna Convention on the Law of Treaties permits the use of all the conventional instruments of the WTO agreements for the purposes of interpreting just one of them.

I would, however, like to call attention to the significance — always in an interpretative sense — of the reference that the Understanding on the Rules and Procedures for the Settlement of Disputes operates with regard to the GATT *acquis*. It is true that interpretative practice of panels under GATT 1947 was highly criticized. Panels were reproached for relying solely on the text of the GATT Agreement and ignoring all other international law. Panel members, who rarely had legal backgrounds, perhaps did not know much about international law. When uncertain about how to rule in a particular case, they consulted the *travaux préparatoires*. This system also met with heavy criticism, since reliance on the *travaux préparatoires* of a treaty should not be to the exclusion of the general rules of interpretation in international law. Nevertheless, the *travaux préparatoires* for the GATT 1947 were helpful to many panels in reaching balanced solutions which were acceptable to the contracting parties, thus permitting them to better carry out their function. Furthermore, use of *travaux préparatoires* for the purpose of interpretation is not ignored by the 1969 Vienna Convention.

Interpretative practice of GATT 1947 panels led to certain other useful solutions, among which I would like to point out the presumption of nullification or impairment of a benefit whenever a breach of the General Agreement is ascertained. Since Article XXIII establishes that the requisite condition to set in motion the dispute

settlement mechanism is either the nullification or the impairment of a benefit, and not the breach of an obligation, a breach must somehow be equated to nullification or impairment. This presumption, developed by panels, has worked for this purpose, and is now codified in Article 3.9 of the Understanding on the Rules and Procedures for the Settlement of Disputes.

What trends are currently developing in the WTO panel and Appellate Body case law? Besides the affirmation of the customary value of Articles 31 and 32 of the Vienna Convention on the Law of Treaties, there also appears to be a clear reduction in the reliance on the *travaux préparatoires*. Evidently, past criticism has made its effect felt, so much so that some commentators today maintain that consultation of the *travaux préparatoires* by the Dispute Settlement Body is even insufficient. Instead, interpretative criteria has been used which, though not explicitly mentioned in the Vienna Convention, grants effect to treaty provisions and lends itself particularly to the interpretation of international law. In addition, weight must be given to the consequences of interpretation so that the results are not manifestly absurd or unreasonable. Here — and always within the context of the Vienna Convention — the *travaux préparatoires* are useful.

Skouteris also analyzes other aspects of interpretation which are worth noting. On the basis of Article IX.2 of the Agreement establishing the World Trade Organization, the Ministerial Conference and the General Council of the Organization have the power to adopt interpretive decisions relating to the WTO Agreement itself and to the Multilateral Trade Agreements. These decisions are deemed as being capable of falling within Article 31.3(b) of the Vienna Convention relating to subsequent practice in the implementation of a treaty which indicates agreement by its contracting parties regarding its interpretation.

A few problems arise with respect to the consideration to be given to previously adopted panel reports. In the WTO dispute settlement system, the principle “*stare decisis*” does not really apply, a gap which is completely justified. The flexibility required of the panels to evaluate controversial situations in the area of international trade and to decide the relative disputes is better served by the

possibility of moving away from previous decisions rather than by an obligation to conform to them. Therefore, the interpretations found in previously adopted panel reports should not be considered binding. Certainly, they do have an important auxiliary interpretative function for successive decisions: a better clarification of this function is left to future practice. We may conclude that the WTO DSU case law experience to date indicates a tendency towards the systematic interpretation of the set of Multilateral Agreements. By virtue of the fortunate decision taken during the final stage of the Uruguay Round, this interpretation binds all Member States, and thus exactly fits within the Vienna Convention's Article 31.2(a) which refers to "any agreement relating to the treaty which was made between all parties in connection with the conclusion of the treaty." Moreover, the practice of supporting interpretative operations with texts agreed by the parties, again, dates back to the GATT 1947 and in particular to its Annex 1, which is an integral part of the General Agreement and consists in a series of definitions utilizable for interpretative purposes. And finally, it must not be forgotten that many agreements stipulated at the end of the Uruguay Round are dedicated to the interpretation of certain GATT rules (Article II.1.(b), Article XVII, Article XXIV, Article XXVIII). Hence, it is confirmed the value of a systematic interpretation of all the conventional instruments which make up the WTO system is fully brought out.

ELISA BARONCINI

THE WTO DISPUTE SETTLEMENT UNDERSTANDING
AS A PROMOTER OF TRANSPARENT, RULE-ORIENTED,
MUTUALLY AGREED SOLUTIONS —
A STUDY ON THE VALUE OF DSU CONSULTATIONS
AND THEIR POSITIVE CONCLUSION

SUMMARY: Introduction. — 1. The institutional evolution of the GATT 1947 towards rule-oriented diplomacy. — 2. The Dispute Settlement Understanding: the solemn final stone for a WTO rule-oriented diplomacy. — 3. The aim of the DSU: to secure a positive solution to a dispute. — 4. The relativity of the short time limits provided for by the DSU. — 5. The consultations phase. — *a)* The evolution of the diplomatic phase since GATT 1947. — *b)* The value of consultations in the 1994 DSU. — *c)* Mistakes regarding the definition of the legal content of DSU consultations in the Banana Panel Report. — 6. Appropriate identification of claims and facts at the consultations stage. — 7. WTO practice regarding consultations. — *a)* The drafting of the request for consultations. — *b)* The richness of the consultations phase in the US/Japan dispute on autos and automotive parts and the Automotive Agreement settling the dispute. — 8. Improvement in frequency and depth of bilateral analysis of trade matters produced by the DSU. — 9. The DSU ability to devise diplomatic solutions for cases longly debated (and to no avail) outside its framework. — 10. The solutions to the Indian import restrictions. — 11. Reaching a mutually agreed solution during panel proceedings: the *Scallops* case. — 12. The duty to notify of mutually agreed solutions and the policy of transparency concerning WTO matters. — 13. The fulfilment of the mandatory notification by WTO Members. — *a)* Through a notice entitled "Notification of Mutually Agreed Solution". — *b)* "Points" already raised before the DSB by WTO Members third parties to notified mutually agreed solutions. — *c)* Other means of giving notice of satisfactory solutions. — 14. Benefits of the notifying WTO Members. — 15. Positive effects of the notification of WTO mutually agreed solutions for the institutional systems of WTO Members. The case of the EC. — *a)* The qualification of the concept of mutually agreed solution in the light of public international law. — *b)* The EC institutions competent to conclude WTO mutually agreed solutions. — 16. Conclusions: more than a rich diplomatic balance for the DSU.

Introduction.

The object of this work is the analysis of the discipline established by the Dispute Settlement Understanding (DSU) ⁽¹⁾ of the World Trade Organization (WTO) ⁽²⁾ with regard to consultations and to their positive conclusion — the mutually agreed solutions — and the analysis of the resulting practice by WTO Members which has made a positive use of the DSU rules on the diplomatic settlement of controversies.

In fact, as an examination of the legal texts clearly indicates, the new WTO dispute mechanism has been drafted so as to foster among its Members a strong cooperation based primarily on the voluntary respect of the new international trade rules. The adjudicatory phase is considered in second light, and recourse to it may be attempted only after the diplomatic phase has been adequately performed for the required period of time. Our purpose is then to investigate how WTO Members, in particular the EC, have reacted to, interpreted and applied those diplomatic features, in order to see if the functioning of the DSU has realized the aim it has been assigned, and if the new dispute settlement system has produced other positive effects in international trade relations, as well as within the institutional life of WTO Members when implementing Marrakech law and developing their trade and trade-related policies.

(1) For the text of this Agreement and a collection of all the provisions of WTO Agreements and all the GATT/WTO decisions related to dispute settlement procedures see *The WTO Dispute Settlement Procedures - A Collection of Legal Texts*, WTO, Geneva, 1995.

(2) For the full text of the Agreement establishing the WTO and all the annexed WTO Multilateral and Plurilateral Agreements see *The Results of the Uruguay Round of Multilateral Trade Negotiations - The Legal Texts*, WTO, Geneva, 1995, and *ILM*, 1994, pp. 1140 ff. For an overview of the institutional and substantive results achieved by the Marrakech Agreements see A. BEVIGLIA ZAMPETTI, *L'Uruguay Round: una panoramica dei risultati*, in *Diritto del Commercio Internazionale*, 1994, pp. 825-842; P. DEMARET, *The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization*, in *Columbia Journal of Transnational Law*, 1995, Vol. 34 no. 1, pp. 123-171; D. LEEBRON, *An Overview of the Uruguay Round Results*, in *Columbia Journal of Transnational Law*, 1995, Vol. 34 no. 1, pp. 11-35.

First, the evolution undergone by the GATT dispute settlement system since 1947 will be explored, showing that the Marrakech DSU may be considered as the final stage of an evolution towards a “rule-oriented” diplomacy ^(2a); particular attention will be paid to the strengthening of the consultations phase, showing its improved capacity to promote direct settlements arising from the presence in the DSU of a full right to a panel.

Next, mutually agreed solutions will be discussed, reconstructing the initial divergencies opposing WTO Members that they have been able to remove as well as the negotiating process preceding their conclusion, elements and activities usually spread out in many documents issued by different sources — both within and outside the WTO — the full knowledge of which is however absolutely necessary for the proper assessment of their final content, their legal nature, and therefore their importance. Of course, due account will also be given to the requirements imposed by the DSU with regard to the mutually agreed solutions, and to the mechanisms set up for their observance.

1. *The institutional evolution of the GATT 1947 towards rule-oriented diplomacy.*

The provisions devoted by GATT 1947 ⁽³⁾ to consultations and dispute settlement were articles XXII and XXIII. Their wording

(2a) According to the very effective expression developed by Professor John H. Jackson. See *infra*, at footnote 11.

(3) The General Agreement on Tariffs and Trade (GATT) was signed in Geneva on 30 October 1947, 55 UNTS 187. It became effective on 1 January 1948 by virtue of the Protocol of Provisional Application, done in Geneva always on 30 October 1947. As it is well known, the GATT 1947 was applied on the basis of that Protocol of Provisional Application until the entering into force of the WTO. The pre-Uruguay Round version of GATT 1947 may be read in 1969 *BISD* Vol. 4, which contains also, at pp. 77-78, the 1947 Protocol of Provisional Application. On the history of GATT 1947 see D. CARREAU, T. FLORY, P. JUILLARD, *Droit international économique*, LGDJ, Paris, 1990, p. 95 ff. On the provisional regime see F. ROESSLER, *The Provisional Application of the GATT: Note on the Report of the GATT Panel on “Manufacturing Clause” in the US Copyright Legislation*, in *JWT*, 1985, pp. 289-295. More generally, on the regime of the provisional application of

was — and still is ⁽⁴⁾ — very clear on the duty to enter into bilateral, or direct, consultations. However it was far from detailed regarding the rules to be followed by the parties when asked to enter consultations, and when direct consultations failed. It was clear that the impossibility “to find a satisfactory solution through consultation” ⁽⁵⁾ or a “satisfactory adjustment ... within a reasonable time” ⁽⁶⁾ allowed, also on unilateral request, the initiation of a multilateral consultation ⁽⁷⁾ or investigation ⁽⁸⁾ of the matter by the CONTRACTING PARTIES ⁽⁹⁾; however, no guidelines were provided for determining when an amicable settlement was to be considered impossible to achieve and what was to be understood by “a reasonable time.” Nor were the powers and procedures to be followed by the CONTRACTING PARTIES charged with solving the dispute any more precise: according to the simple wording of

international agreements see N. BOSCHIERO, *L'applicazione provvisoria di accordi internazionali in un recente disegno di legge*, in RDIPP, 1984, pp. 481-500; M. GIULIANO, T. SCOVAZZI, T. TREVES, *Diritto internazionale-Parte generale*, Giuffrè, Milano, 1991, pp. 305 ff; M. PAZ ANDRES SÁNZ DE STA, *La aplicación provisional de los tratados internacionales en el derecho español*, in REDI, 1982, pp. 31-78; P. PICONE, *L'applicazione in via provvisoria degli accordi internazionali*, Napoli, 1973; D. VIGNES, ‘*Une notion ambiguë*’: *la mise en application provisoire des traités*, in AFDI, 1972, pp. 181-199.

(4) These two provisions remain unchanged in GATT 1994. See Annex 1 A to the WTO Agreement.

(5) Article XXII:2 of GATT 1947.

(6) Article XXIII:2 of GATT 1947.

(7) Article XXII:2 of GATT 1947.

(8) Article XXIII:2 of GATT 1947.

(9) The use of capital letters was the formula adopted in GATT 1947 to designate “the contracting parties acting jointly” (Article XXV: 1), i. e. the only institutional body expressly envisaged when the General Agreement entered into force. The same expression in small letters signified the individual GATT Members. On 4 June 1960 the CONTRACTING PARTIES established the GATT Council, the intersessional body provided with the authority to pursue all questions dealt by the CONTRACTING PARTIES during their annual formal session, with the exception of the granting of waivers under Article XXV:5. On the initial modest GATT institutional structure and its subsequent evolution see A. COMBA, *Il neo-liberismo internazionale*, Giuffrè, Milano, 1995, pp. 158 ff.; E. GREPPI, *La disciplina giuridica internazionale della circolazione dei servizi*, Jovene, Napoli, 1994, pp. 53 ff.; J.H. JACKSON, *World Trade and the Law of GATT*, Indianapolis, Bobbs Merrill, 1969, pp. 108 ff.; G. VENTURINI, *L'accordo generale sulle tariffe doganali ed il commercio (GATT)*, Giuffrè, Milano, 1988, pp. 11 ff.

Article XXIII:2 they were to “promptly investigate any matter so referred to them and ... make appropriate recommendations ... or give a ruling on the matter, as appropriate.” There was no indication about the meaning to attribute to “promptness”, or to the concepts of recommendation and ruling, nor was any *criterium* set to be followed by the CONTRACTING PARTIES when deciding, with reference to a particular dispute, whether it was more appropriate to give a recommendation or a ruling.

Subsequent practice has filled all those *lacunae*, introduced new procedures and even changed the process of decision-making provided for by Article XXV of GATT 1947 ⁽¹⁰⁾. It was up to the Contracting Parties to decide the direction towards which the GATT dispute settlement system was to evolve, i.e. towards a power-oriented diplomacy or a rule-oriented diplomacy ⁽¹¹⁾. Both of these diplomatic techniques aim at solving a dispute through an amicable settlement; but while in the first case only settlement by diplomatic means — i. e. by an agreement concluded by the disputants, even if with the more or less significant intervention of a third party — is contemplated, in the second one the failure of direct negotiations, as that of the other diplomatic procedures, is followed by an automatic binding decision taken by a third-party body — an arbitrator or a college of arbitrators, or also a permanent standing tribunal ⁽¹²⁾.

(10) On the GATT 1947 decisional mechanism see *infra*, at footnote 22.

(11) On this topic see J.H. JACKSON, *The World Trading System-Law and Policy of International Economic Relations*, The MIT Press Cambridge, London, 1989, p. 85 ff.; Id., *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, in JWT, 1979, pp. 1-21; Id., *The Crumbling Institutions of the Liberal Trade System*, in JWT, 1978, pp. 93-106.

(12) On the peaceful means for settling disputes see D. CARREAU, *Droit international*, Pedone, Paris, 1994, pp. 516 ff; J. COMBACAU, *Droit du contentieux international*, in J. COMBACAU, S. SUR, *Droit international public*, Montchrestien, Paris, 1995, pp. 565 ff; B. CONFORTI, *Diritto internazionale*, Editoriale Scientifica, Napoli, 1997, pp. 411 ff; A. EYFFINGER, *The International Court of Justice, 1946-1996*, Kluwer Law International, The Hague, London, Boston, 1996 and the bibliography there quoted; M. GIULIANO, T. SCOVAZZI, T. TREVES, *Diritto internazionale-Parte generale*, cit., pp. 501 ff; J.G. MERRILLS, *International Dispute Settlement*, Grotius Publications Ltd., Cambridge, 1991, 2nd ed; R. OSTRIHANSKY, *Settlement of International Trade Disputes-The Rôle of Law and Legal Procedures*,

When only diplomatic means are contemplated the settlement of a controversy requires the disputing parties to reach an agreement: in this case it is an undeniable and constantly demonstrated fact that the more powerful of the countries involved has a great advantage, "irrespective of the merits of the dispute" ⁽¹³⁾, so that not only the results of the diplomatic procedures, but also the evaluations of the opportuneness of starting a case, will be "power-oriented."

On the contrary, with regard to the second dispute mechanism we may speak of "rule-oriented diplomacy" because the negotiators' awareness that the matter will be decided by a third independent entity if an amicable settlement is not reached changes the diplomats' negotiating technique: this will be obviously focused on "their respective predictions as to the outcome of the [independent entity's decision] ... and not ... [on the] potential retaliation or actions exercising power of one or more parties to the dispute" ⁽¹⁴⁾. "In both techniques *negotiation and private settlement of disputes is the dominant mechanism for resolving differences*; but the key is the perception of the participants as to what are the 'bargaining chips'" ⁽¹⁵⁾.

The GATT signatory countries and the other international subjects that subsequently adhered to that Agreement have constantly moved towards rule-oriented diplomacy, progressively developing the right to invoke unilaterally the intervention of an independent

in *NYIL*, 1991, pp. 163-214; W. POEGGEL, E. OESER, *Les modes de règlement diplomatique*, in M. BEDIAOUI, (ed.) *Droit international: Bilan perspectives*, Vol. I, Pedone, Paris, 1991, pp. 535 ff; J. SETTE-CAMARA, *Les modes de règlement obligatoire*, in M. BEDIAOUI, (ed.) *Droit international: Bilan perspectives*, cit., pp. 543 ff; M.N. SHAW, *International Law*, 3rd ed., Cambridge University Press, Cambridge, 1991, pp. 629 ff; N.K. TARASSOV, *Introduction à le règlement pacifique des différends*, in M. BEDIAOUI, (ed.) *Droit international: Bilan perspectives*, cit., pp. 525 ff.

(13) J.G. CASTEL, *The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures*, in *ICLQ*, 1989, pp. 834-849, at p. 841.

(14) J.H. JACKSON, *The World Trading System - Law and Policy of International Economic Relations*, The MIT Press Cambridge, London, 1989, p. 86.

(15) J.H. JACKSON, *The World Trading System - Law and Policy of International Economic Relations*, cit., p. 86, emphasis added.

entity and the binding force of the report issued by it irrespective of the consent of the losing country.

The caution and thus the graduality that characterize the institutional development process of the GATT dispute settlement mechanism were due to the fact that the Contracting Parties, while strongly perceiving the need for prompt and peaceful settlement of trade disputes, felt at the same time the necessity to retain the most of their sovereignty on the interpretation and application of the rules they agreed on. However, an equilibrium between these two demands has always been found because of the undisputed recognition of the interdependence of national economies. As the Contracting Parties themselves recognized, global interdependence "means that no country can solve its trade problems in isolation" ⁽¹⁶⁾, and that lasting economic, and consequently, social improvements can be achieved only through multilateral cooperation, i. e., within a solid framework of commonly agreed rules, provided with an institutional system capable of guaranteeing their respect as well as an equilibrium in international trade relations.

Since the beginning of the provisional application of GATT 1947 ⁽¹⁷⁾, the vital importance of a functioning and accepted dispute settlement system has been perceived. Initially, because of the great cohesiveness of the signatory countries, controversies were decided by a ruling of the Chairman, accepted by *consensus*, or even by a vote of the CONTRACTING PARTIES ⁽¹⁸⁾. Shortly afterwards it was realized, with the significative help of the GATT Secretariat, that what expressly stated by Article XXIII in case of failure of direct consultations between or among the conflicting parties, i. e. the

(16) See the Ministerial Declaration adopted by the CONTRACTING PARTIES on 29 November 1982 (L/5424), at para. 5, in *BISD* 29S/9.

(17) On the regime of provisional application see *supra*, footnote 3.

(18) See R.E. HUDEC, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, Butterworth Legal Publishers, Salem, New Hampshire, 1993, p. 29. The author remarks that the so called "clubbiness" of the GATT founding Members was due to the relatively small number of signatories and to the fact that the representatives of GATT Members in GATT bodies had been the negotiators of the same Agreement, thus knowing what was to be expected from the application and interpretation of the rules they drafted and approved.

investigation of the case by the CONTRACTING PARTIES, could become too cumbersome and, by far, not at all the most appropriate means for settling, and settling promptly, the dispute. Therefore, the CONTRACTING PARTIES, also on the initiative of the GATT Secretariat ⁽¹⁹⁾, instead of examining and investigating directly the issues referred to them, began to delegate the analysis of the case to "working parties." These *ad hoc* bodies, "whose membership was open to all interested contracting parties who wished to be represented" ⁽²⁰⁾, were composed of "a number of delegations, varying from five to eighteen according to the importance of the question or the interests involved" ⁽²¹⁾ — including the disputants — who acted in their official capacity upon instructions from their capital. Having realized that it was very difficult to reach a common view because of the presence of the GATT Members directly involved, the "working party" started to state separately the conclusions of the majority and that of the losing, dissenting member. Soon thereafter the "working party" was substituted by the "panel", a group very different from the first one because of the number of its members — three or five — and of their *status* — they did not represent a Contracting Party, but sat in the panel as private individuals.

However, the creation of this third-party body through GATT

(19) The GATT Secretariat strongly supported the legalistic development of the dispute settlement system, since this would have strengthened its role and powers. On this point see R.E. HUDEC, *The GATT Legal System and World Trade Diplomacy*, Praeger Publishers, New York, 1975, pp. 69-70.

(20) R. PLANK, *An Unofficial Description of How a GATT Panel Works and Does Not*, in *Journal of International Arbitration*, 1987, no. 4, pp. 53-102, at p. 55.

(21) See GATT, *Considerations Concerning Extended Use of Panels*, Note by the Executive Secretary (Revision), L392/Rev.1, 6 October 1955, at para. 2, also published in R.E. HUDEC, *The GATT Legal System and World Trade Diplomacy*, cit., pp. 297 ff. On the appearance of working parties and of independent panels see P. PESCATORE, *Drafting and Analyzing Decisions on Dispute Settlement*, in P. PESCATORE, W.J. DAVEY, A.F. LOWENFELD, *Handbook of GATT Dispute Settlement*, Transnational Juris Publications, Inc., Irvington on Hudson, 1994, at p. 7; P. PESCATORE, *The GATT Dispute Settlement Mechanism-Its Present Situation and its Prospects*, in *JWT* 1993, no. 1, pp. 5-21, at p. 6; F. ROESSLER, *Evolution du Système de Règlement des Différends du GATT/de l'OMC*, in *La Réorganisation Mondiale des Echanges (Problèmes Juridiques)*, Colloque de Nice, Société Française pour le Droit International, Pedone, Paris, 1996, pp. 309-317, at pp. 314-315.

practice was not yet enough to qualify the GATT dispute settlement system as an accomplished rule-oriented diplomacy. The GATT 1947 panel was not a college of arbitrators: the *consensus* of the Contracting Parties ⁽²²⁾ was needed in order to establish the panel, to define its terms of reference and its composition as well as to adopt its reports. The GATT panel mechanism was more like the type of conciliation procedure which is typical of the dispute systems of many international economic organizations, that tend to “multilateralize” a dispute which is not amicably settled by the members directly involved ⁽²³⁾ since their contracting parties intend to main-

(22) From the joint reading of Articles XXIII and XXV of GATT it emerges that the CONTRACTING PARTIES could take “joint action ... with a view to facilitating the operation and furthering the objectives of this Agreement” (Article XXV:1 of GATT 1947) — and thus could delegate the investigation of a case referred to them to a group of independent experts — and “make appropriate recommendations ... or give a ruling on the matter” (Article XXIII:2 of GATT 1947) at the majority of the votes cast. Nevertheless this majority vote procedure was never followed for the establishment of panels, their composition for the definition of their terms of reference, or for the adoption of their reports, thus producing a *de facto* change in GATT procedures *pro consensus*. In practice, a formal vote was avoided, and an item was put on the agenda of the GATT Council or of the GATT CONTRACTING PARTIES meetings only after a compromise solution acceptable to all was found with regard to that particular topic. On the decision-making process within the GATT 1947 system see M.E. FOOTER, *The Role of Consensus in GATT /WTO Decision-Making*, in *Nw. J. Int'l. L. & Bus.*, 1996-1997, pp. 653-680. More generally, on *consensus* in international organizations see A. CASSESE, *Il diritto internazionale nel mondo contemporaneo*, Il Mulino, Bologna, pp. 218 ff; P.C. JESSUP, *Procedure by Consensus—“Silence gives consent”*, in *Comunicazioni e studi*, Vol. XIV, 1975, pp. 401-412; M. PANEBIANCO, G. MARTINO, *Elementi di diritto dell'Organizzazione internazionale*, Giuffrè, Milano, 1997, pp. 137 ff.

(23) See E. CANAL-FORGUES, *L'institution de la conciliation dans le cadre du GATT-Contribution à l'étude de la structuration d'un mécanisme de règlement des différends*, Etablissement Emile Bruylant, Bruxelles, 1993, at pp. 58 ff. As an example of provisions of international economic organizations which confer on the Council, composed by all the representatives of the Contracting Parties, the power to directly settle a dispute or to decide in light of a report presented by an *ad hoc* consultative commission see Article 8 of the 1995 International Wheat Agreement (annexed to the Council Decision No. 96/88/EC of 19 December 1995 concluding that Agreement on behalf of the European Community, in *OJEC* L21/47 of 27 January 1996), Article 31 of the 1994 Tropical Timber Agreement (annexed to the Council Decision No. 96/493/EC of 29 March 1996 concerning the signature and the provisional application on behalf of the European Community of that Agreement, in *OJEC* L208/1 of 17 August 1996), and Articles 55 and 56 of the 1995

tain "the ultimate authority" to interpret the rules on which they have agreed ⁽²⁴⁾. Thus, a GATT 1947 panel procedure could be blocked by the party asked to defend itself in front of the panel, by the losing party, that could veto the final panel report, hence impeding it to acquire binding force, as well as by any Contracting Party that, dissatisfied with the result of a panel report, could put its veto during the adoption procedure of the final panel report before the GATT Council ⁽²⁵⁾.

Nevertheless, step by step, a right to a panel, not conditioned by any veto power, was eventually realized. Especially in consequence of the most embarrassing cases of inadequacy of the dispute system to provide an authoritative and respected answer when the need for a solution was really absolute, i.e. when the views of the disputants were really irreconcilable ⁽²⁶⁾, GATT Members have found the strenght to draft and agree on more demanding rules.

Thus, in 1979, *consensus* was reached to indicate time limits for

International Natural Rubber Agreement (annexed to the Council Decision No. 96/704/EC of 22 November 1996 concerning its provisional application by the European Community, in *OJEC* L324/1 of 13 December 1996).

(24) With specific reference to GATT 1947 see R. PLANK, *An Unofficial Description of How a GATT Panel Works and Does Not*, cit., at p. 89.

(25) On the delays caused by the veto power see, among others, W.J. DAVEY, *Dispute Settlement in GATT*, in *Fordham International Law Journal*, 1987/88, pp. 51-109. With reference to the disadvantages caused to the developing countries by the delays in the GATT 1947 dispute settlement procedures see M.M. CHING, *Evaluating the Effectiveness of the GATT Dispute Settlement System for Developing Countries*, in *World Competition*, 1992/93, no. 2, pp. 81-112 and K.O. KUFUOR, *From the GATT to the WTO-The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes*, in *JWT*, 1997, no. 5, pp. 117-145.

(26) Under the 1979 Tokyo Round Codes it was very often impossible to achieve *consensus* for the adoption of many panel reports (for a list of all the cases see E.U. PETERSMANN, *The GATT /WTO Dispute Settlement System*, Kluwer, London, The Hague, Boston, 1997, pp. 271 ff). For the difficulties encountered by the EC and the US to accept the findings of panel reports issued under the 1979 Subsidies Code with regard to the EC export subsidies in agriculture see I. GARCIA BERCERO, *Trade Laws, GATT and the Management of Trade Disputes between the US and the EEC*, in *YEL*, 1985, pp. 149-189.

Emblematic are also the first steps of the Hormones dispute, formally raised in 1987 by the US, alleging the incompatibility of the EC ban on importation of hormone-treated meat and animals with the 1979 Agreement on Technical Barriers to Trade (TBT Agreement). The procedure was blocked by the EC, since the US and

the composition of GATT panels and for the release of their final reports ⁽²⁷⁾. Ten years later, clearly established time limits for consultations and other significant improvements in the drafting of the request for such consultations ⁽²⁸⁾ led to the right to ask for a panel after a fixed period of direct talks ⁽²⁹⁾, and the veto power

the EC could not agree on the scope of the 1979 TBT Agreement and thus on the terms of reference the panel should have received. The controversy has only recently achieved a solution, thanks to the new rules on the adoption of WTO panel and Appellate Body reports (see *EC Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body of 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R). On the Hormones controversy within GATT 1947 and WTO see M. WYNTER, *The Agreement on Sanitary and Phytosanitary Measures in the Light of the WTO Decisions on EC Measures concerning Meat and Meat Products (Hormones)*, Hague Academy of International Law, 1997 Research Centre, English Speaking Section.

For the problems encountered by the EC in accepting GATT 1947 panel reports concerning its banana import regime see *infra*, para. 5 c).

(27) See the *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, adopted on 28 November 1979, L/4907, and the annexed *Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2)*, in *BISD* 26S/210. The 1979 *Understanding* did not indicate any time-limit with regard to the establishment of a panel by the CONTRACTING PARTIES, but only for the subsequent phases: once the panel was established, it stated that the composition of the panel should be decided "as promptly as possible and normally not later than thirty days from the decision by the CONTRACTING PARTIES", and that "[t]he parties to the dispute would respond within a short period of time, i. e., seven working days, to nominations of panel members by the Director-General and would not oppose nominations except for compelling reasons" (see paras. 11 and 12). With reference to the activity of the panels, the 1979 *Understanding*, while recalling that in previous 1979 GATT practice "in most cases the proceedings of the panels have been completed within a reasonable period of time, extending from three to nine months", stressed that "[t]he time required by panels will vary with the particular case". "However -it added- panels should aim to deliver their findings without undue delay, taking into account the obligation of the CONTRACTING PARTIES to ensure prompt settlement" (see para. 20 and footnote 1 to it). The 1979 *Understanding* expressed a time limit only about urgent cases: "[i]n cases of urgency the panel would be called upon to deliver its findings within a period normally of three months from the time the panel was established."

(28) *Improvements to the GATT Dispute Settlement Rules and Procedures*, Decision of 12 April 1989 (L/6489), in *BISD* 36S/61.

(29) The 1989 *Improvements* stated that "[i]f a request [for consultations] is made under Article XXII:1 or XXIII:1, the contracting party to which the request is made shall, unless otherwise mutually agreed, reply to the request within ten days after its receipt and shall enter into consultations in good faith, within a period of

with regard to the composition of the panel was eliminated: "[i]f there [was] no agreement on the members within twenty days from the establishment of a panel" each party was allowed to refer the task of selecting the panelists to the Director-General ⁽³⁰⁾. The same time limit was provided for with regard to the definition of the terms of reference of the panel, which would be based on the request for a panel circulated by the complaining party "unless the parties to the dispute agree[d] otherwise within twenty days from the establishment of the panel" ^(30a). The rule of *consensus* however, remained in the establishment of a panel and the adoption of its report.

The veto power was completely removed by the Uruguay Round negotiations, under whose rules the establishment of a panel, as well as the adoption of WTO panel and Appellate Body reports, is quasi-automatic.

2. *The Dispute Settlement Understanding: the solemn final stone for a WTO rule-oriented diplomacy.*

The signature of the Final Act of the Uruguay Round, and so of

no more than thirty days from the date of request, with a view to reaching a mutually satisfactory solution. If the contracting party does not respond within ten days, or does not enter into consultations within a period of no more than thirty days, or a period otherwise mutually agreed, from the date of the request, then the contracting party that requested the holding of consultations may proceed directly to request the establishment of a panel or a working party" (para. C 1).

The amelioration brought about by the 1989 *Improvements* with regard to the discipline to be observed by consulting parties is striking if compared to what was provided for by the 1979 *Understanding* with regard to consultations. On that occasion, "Contracting Parties affirm[ed] their resolve to strengthen the effectiveness of consultative procedures employed by contracting parties", but were not able to agree on any specific obligation. They limited themselves to adding to the very general duties to give "sympathetic consideration" and to "afford adequate opportunity for consultations" already provided for by Articles XXII and XXIII GATT 1947 the obligations "to respond to requests for consultations promptly and to attempt to conclude consultations expeditiously, with a view to reaching mutually satisfactory conclusions" (see para. 4 of the 1979 *Understanding*).

(30) "[A]t the request of either party, the Director-General, in consultations with the Chairman of the Council, shall form the panel by appointing the panelists whom he considers most appropriate, after consulting both parties" (1989 *Improvements*, para. F (c) 5).

(30a) 1989 *Improvements*, para F (b), *Standard Terms of Reference*.

the "Understanding on rules and procedures governing the settlement of disputes" ⁽³¹⁾ on April 15, 1994 at Marrakech marks the full achievement of the goal of a rule-oriented diplomacy for settling international trade disputes ⁽³²⁾.

With the new DSU rules it is clear that, when settling directly a case formally referred to the WTO, the consent of the disputants is not anymore conditioned by the dilatory techniques and the economic pressure of the stronger country or, more generally, by the veto power of the counterpart. In fact, the Marrakech dispute settlement system has overcome any possibility of unilateral blockage of its procedures, and it provides for very strict time-limits for its first diplomatic phase as well as for its second, eventual, adjudicatory one. When a controversy arises between two or more WTO Contracting Parties, the Member whose benefits are "impaired by measures taken by another Mem-

(31) On the new WTO DSU see, among others, M. COCCIA, *Il sistema di soluzione delle controversie nella WTO*, in A. GIARDINA, G.L. TOSATO, (eds.) *Diritto del commercio internazionale*, Giuffrè, Milano, 1996, pp. 89-101; C. COCUZZA, A. FORABOSCO, *Il sistema di risoluzione delle controversie commerciali tra Stati dopo l'Uruguay Round del GATT*, in *Diritto del Commercio Internazionale*, 1996, pp. 139-164; N. KOMURO, *The WTO Dispute Settlement Mechanism-Coverage and Procedures of the WTO Understanding*, in *JWT*, 1995, no. 4, pp. 5-95; A. LIGUSTRO, *Le controversie tra Stati nel diritto del commercio internazionale: dal GATT all'OMC*, Cedam, Padova, 1996; Id., *La soluzione delle controversie nel sistema dell'Organizzazione Mondiale del Commercio: problemi interpretativi e prassi applicativa*, in *RDI*, 1997, pp. 1003-1085; A. LOWENFELD, *Remedies Along with Rights: Institutional Reform in the New GATT*, in *AJIL*, 1994, pp. 477-488; P. MENGOLZI, *The Marrakech DSU and the Contracting Parties' Mechanism for the Settlement of International Trade Disputes: A Comment on the Kuyper Report*, in J.H.J. BOURGEOIS, F. BERROD, E. GIPPINI FOURNIER, (eds.), *The Uruguay Round Results: A European Lawyers Perspective*, College of Europe, Bruges, 1995, pp. 275-290; M. MONTANA I MORA, *A GATT with teeth: Law Wins over Politics in the Resolution of International Trade Disputes*, in *Colum. J. Transnat'l L.*, 1993/94, pp. 103-180; E.U. PETERSMANN, *The GATT/WTO Dispute Settlement System*, cit.; Id., *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, in *CML Rev.*, 1994, pp. 1157-1244; H. RUIZ FABRI, *Le règlement des différends dans le cadre de l'Organisation mondiale du commerce*, in *JDI*, 1997, pp. 709-755; G. SACERDOTI, *La trasformazione del GATT nell'Organizzazione mondiale del commercio*, in *Diritto del Commercio Internazionale*, 1995, pp. 73-90.

(32) Also the DSB Chairman, Celso Lafer, in an official statement made during a DSB meeting, declared that the DSU is "a result of codification and progressive development of the GATT system." See *DSB Minutes of Meeting* of 27 September 1996, WT/DSB/M/22, part 5.

ber" ⁽³³⁾ has primarily to request for and enter into consultations with that country. The DSU sets for precise time limits for these consultations. Once the time limit expires, if the request for consultations is not answered, if consultations do not take place, or if an amicable solution is not found, it is possible for the complainant unilaterally to initiate third-party binding proceedings. In fact, "unless otherwise mutually agreed", the failure *a)* to reply within ten days to the request for consultations, *b)* to enter into consultations within 30 days after the date of receipt of that request and *c)* to settle the dispute within 60 days — reduced to 20 "in cases of urgency, including those which concern perishable goods" — enables the complaining Member to request the establishment of a panel ⁽³⁴⁾.

The establishment of the panel is no longer conditioned by the veto power. In fact, Article 6:1 DSU states that "[i]f the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, *unless at that meeting the DSB decides by consensus not to establish a panel*" ⁽³⁵⁾; Article 7:1 DSU restates the 1989 *Improvements* rule according to which the terms of reference of the panel will be based on the request for a panel circulated by the complaining party "unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel." Finally, Article 8:7 DSU reinforces what already established by the 1989 *Improvements*, stating that "[i]f there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute."

The panel so formed is to "make an objective assessment of the

(33) Article 3:3 DSU.

(34) Article 4 DSU, paras. 3, 7 and 8.

(35) Emphasis added.

matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" in order "to assist the DSB in discharging its responsibilities under [the DSU] and the covered agreements" ⁽³⁶⁾. At the same time, it has to "consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution" ⁽³⁷⁾. The panel has thus maintained its GATT 1947 function of conciliation.

However, "[w]here the parties to the dispute have failed to develop a mutually satisfactory solution" ⁽³⁸⁾, the panel has to submit to the DSB its final report within six months "from the date that the composition and terms of reference of the panel have been agreed upon" ⁽³⁹⁾. This report will become binding almost automatically: in fact, instead of the pre-WTO veto power, Article 16:4 DSU establishes that "the report shall be adopted [by the DSB] ... unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides *by consensus not to adopt the report*" ⁽⁴⁰⁾.

In light of these new provisions, the nature of WTO panel proceedings may be defined as a kind of hybrid between conciliation and a sort of arbitration. Indeed, while making "an objective assessment" of the controversy, panelists must also foster a diplomatic resolution of the case, thus realizing a conciliation. If no agreement is achieved by the disputants, a positive solution to the case is nevertheless provided for by the panel report, which will become binding unless appealed within 60 days — the possibility of reaching a *consensus* in the DSB not to adopt the report being extremely unlikely ⁽⁴¹⁾. These fea-

(36) Article 11:1 DSU.

(37) Article 11:1 DSU.

(38) Article 12:7 DSU.

(39) Article 12:8 DSU.

(40) Emphasis added.

(41) In fact a *consensus* in the DSB not to adopt a report requires that also the winner of the case votes against the (favourable for him) final result of the panel activity. This "negative *consensus*" procedure applies also to the adoption of the WTO Appellate Body reports: because of the very weak possibilities of such a vote in the DSB, the "negative *consensus*" has been defined as "*the fiction of political adoption*" of panel and Appellate Body reports". See R. BEHBOODI, *International*

tures of the panel proceedings strongly remind of arbitration, though the two processes cannot be considered as equivalent. Apart from the "transformation" of the panel during its activity we have just remarked, another important difference lies in the mechanism provided for the composition of a panel. Like a college of arbitrators, also a panel is composed case by case: however, unless complainant and respondent agree on the panelists, it will not be possible for the party interested to a binding decision to appoint at least a panel member, as it happens in arbitration. "If there is no agreement on the panelists", the DSU requires their appointment by the WTO Director-General⁽⁴²⁾, a mechanism unknown in the constitution of a college of arbitrators, which guarantees the neutrality of the composition of the panel.

As anticipated, a panel report may be appealed by "a party to the dispute"⁽⁴³⁾. The appeal "shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel"⁽⁴⁴⁾. The authority competent to examine the appeals is the Appellate Body: because of its constitution and its functions, the Appellate Body may be said to be an international *judicial* body. In fact, it is a standing tribunal, whose seven members are appointed for a four-year term: thus in the appellate proceedings disputants have no say in the composition of the Appellate Body, but have to accept that previously appointed by the DSB. Moreover, the persons called to serve on the Appellate Body must be "of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally ... [and] unaffiliated with any government"⁽⁴⁵⁾. The presence of the Appellate Body in the WTO dispute settlement mechanism makes it the most ambitious international instrument for settling trade controversies. Even the most advanced international trade treaties provide only for an arbitration system, the decisions of which very rarely

Trade As Reason: The First Steps of the WTO Appellate Body, Hague Academy of International Law, 1997 Research Centre, English Speaking Section.

(42) See Article 8:7 DSU.

(43) Article 16:4 DSU.

(44) Article 17:6 DSU.

(45) Article 17:3 DSU.

may be reviewed ⁽⁴⁶⁾. Moreover, also where revision is possible, it is left to a body appointed case by case, and not referred to a standing tribunal.

The new features of the WTO DSU may induce to compare it to a national judicial system. However, while the Understanding contemplates many, (relatively) strict ⁽⁴⁷⁾, time-limits allowing for the unilateral establishment of a panel or an arbitration procedure ⁽⁴⁸⁾, the appeal only on issues of law, and the quasi automatic adoption by the DSB of the third-party reports ⁽⁴⁹⁾, it has not introduced the time-limit that most characterizes an internal judicial dispute settlement system, i. e. a foreclosure to the right of a Member to challenge a measure or a practice of another WTO Member under its rules. This means that the Marrakech system maintains the diplomatic feature common to all the international dispute mechanisms, leaving to its contracting parties the political choice of when to introduce a complaint against a specific national measure independently of the date of its entry into force, an important element of diplomacy of the dispute settlement that “peut se justifier dans un système où la négociation joue un rôle aussi important que le droit” ⁽⁵⁰⁾.

(46) The Protocol of Brasilia for the MERCOSUR clearly states that “[t]he Awards of Arbitral Tribunals are final and without appeal” (Article 21); the Parties may only ask to the same Arbitral Tribunal “clarification” of the meaning of the Award or “an interpretation regarding the manner in which it is to be carried out” (Article 22). Chapter XX of NAFTA does not provide for any type of appeal; chapter XIX, concerning dispute settlement in antidumping and countervailing duty matters, establishes a very limited possibility to ask for an Extraordinary Challenge of a panel decision, pursuant to which any party to a dispute may complain that a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct, or that the panel seriously departed from a fundamental rule of procedure, or that the panel manifestly exceeded its powers, authority or jurisdiction (Article 1903:13). For the texts and a bibliography on the Protocol of Brasilia and on the dispute settlement provisions of NAFTA see *infra*, footnote 93. For a study of review mechanisms of international third-party binding decisions see G. SACERDOTI, *Il doppio grado di giudizio nelle giurisdizioni internazionali*, in *Comunicazioni e Studi*, Vol. XXI, 1997, pp. 151-204.

(47) The relativity of the DSU time-limits will be explained in para. 4.

(48) See e. g. Article 21: 3 (c) DSU.

(49) See Articles 16:4 and 17:14 DSU.

(50) I.e. that is justified in a system where negotiation plays a role of equal

3. *The aim of the DSU: to secure a positive solution to a dispute.*

Using the same wording of the 1979 *Agreed Description* ⁽⁵¹⁾, Article 3:7 DSU establishes the goal of the dispute settlement mechanism, i. e. "to secure a *positive solution* to a dispute" ⁽⁵²⁾. The DSU expressly indicates that the best "positive solution", that "clearly to be preferred", is "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements" ⁽⁵³⁾.

The preference for a diplomatic solution arises from the awareness that a) "*the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members*" may be realized only through "[t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member" ⁽⁵⁴⁾, and b) that

importance to law. See Y. RENOUE, *Les mécanismes d'adoption et de mise en oeuvre du règlement des différends dans le cadre de l'OMC sont-ils viables?*, in *AFDI*, 1994, pp. 776-791, at p. 788. In a panel report quoted by this Author (*Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, adopted on 12 July 1983, L/5511, in *BISD* 30S/129) the United Kingdom, on behalf of Hong Kong, filed a complaint in 1982 against the European Community for the quantitative import restrictions maintained by France according to its 1944 trade laws. The EC, defending the case, argued that the "tolerant attitude" showed by the Contracting Parties, and in particular by Hong Kong, towards the French régime "was tantamount equivalent to tacit acceptance of the situation;" on the contrary, Hong Kong replied that its tolerance was not acceptance, but rather the exercise of its "great restraint in not asking for the establishment of a panel until it had exhausted all other possibilities of effecting a satisfactory adjustment on a bilateral basis" (see paras. 17 and 18 of the panel report). The Panel "recognized that restrictions had been in existence for a long time without Article XXIII ever having been invoked by Hong Kong in regard to the product concerned, but concluded that this did not alter the obligations that contracting parties had accepted under GATT provisions" (see para. 28 of the panel report).

(51) *Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2)*, in *BISD* 26S/215, para. 4.

(52) Emphasis added.

(53) Article 3:7 DSU. Aim and preferred tool are then the same resulting from the 1979 *Agreed Description*: see O. LONG, *Law and its Limitations in the GATT Multilateral Trade System*, Graham & Trotman / Martinus Nijhoff, London, Dordrecht, Boston, 1987, at p. 76.

(54) Article 3:3 DSU, emphasis added. The concept of promptness should

the promptest settlement is usually represented by a direct agreement between the parties. Great relevance has rightly been given to the strict time limits and all of the binding devices established by the DSU for the adoption of the final report — be it that of the panel or of the Appellate Body — as well as for the compliance by the “Member concerned” with the recommendations or the rulings of the Dispute Settlement Body (DSB); however, in the absence of a direct settlement which avoids a third-party binding decision, the time-frame for withdrawal of the infringing national measure may be quite long. The DSU does not aim at punishing the violating country, but only at restoring the original equilibrium, at enforcing respect of commitments undertaken by WTO Members. No sanctions are provided for during the time lapse between the request for consultations and the implementation of eventual recommendations adopted by the DSB pursuant to a panel or Appellate report ⁽⁵⁵⁾. Therefore, also in the presence of a clear violation by the respondent, the complainant is most interested in arriving at a rapid solution, since the certainty of winning a case does not necessarily compensate for damages suffered because of the impossibility or the

be understood as relative. Should the disputants agree, the Understanding allows them to extend the time limits fixed in its provisions for a prompt settlement of their case. See *infra*, para. 4.

(55) See Article 3:7 DSU, according to which “[i]n the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures”, and also Article 22:1, again clearly stating that “[c]ompensation and the suspension of concessions or other obligations are temporary measures available in the event that recommendations and rulings are not implemented within a reasonable period of time. However, *neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements*” (emphasis added).

restrictions to accede to the respondent's market while the case is pending before the WTO.

For instance, in the first dispute resolved under the DSU, the *Reformulated Gasoline* case, Venezuela had requested consultation with the US on 23 January 1995 ⁽⁵⁶⁾; after consultations failed, reports were issued by the panel on 29 January 1996 ⁽⁵⁷⁾, and by Appellate Body on 29 April 1996 ⁽⁵⁸⁾. Both concluded, even if on different legal grounds, that the US regulation in question violated GATT law, and so recommended that the DSB requested the US "to bring the baseline establishment rules ... into conformity with its obligations under the *General Agreement*" ⁽⁵⁹⁾. In July 1996, the US and Venezuela agreed that 15 months was a reasonable period for implementation, starting from the date of the DSB's adoption of the Appellate Body report (20 May 1996) ⁽⁶⁰⁾. The US Environmental

(56) *United States-Standards for Reformulated and Conventional Gasoline*, Request for Consultations by Venezuela of 24 January 1995, WT/DS2/1. Venezuela, subsequently joined by Brazil, complained that the US Environmental Protection Agency's (EPA) regulation setting the standards for reformulated and conventional gasoline infringed GATT law.

(57) *United States-Standards for Reformulated and Conventional Gasoline*, Report of the Panel of 29 January 1996, WT/DS2/R.

(58) *United States-Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body of 29 April 1996, WT/DS2/AB/R.

(59) See part V, Findings and Conclusions, of the Appellate Body Report in the *Gasoline* case, WT/DS2/AB/R.

(60) Article 21: 3 DSU establishes the *criteria* for determining the time limits for the implementation of the recommendations and rulings adopted by the DSB. In principle, the WTO Member asked to adapt its measures to the Marrakech system is to comply promptly with the decisions of the DSB. Should this be impossible, Article 21: 3 DSU demands compliance within "a reasonable period of time", which may be defined: by the proposal of the Member concerned, approved by the DSB (Article 21: 3, lett. a) DSU); by an agreement stipulated between the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings by the DSB (Article 21: 3, lett. b) DSU); or through binding arbitration (Article 21: 3, lett. c) DSU). The definition of the time for the implementation of the DSB decisions in the *Gasoline* case falls evidently in the hypothesis provided for by lett. b) of Article 21: 3 DSU. See the WTO document *United States-Standards for Reformulated and Conventional Gasoline*, Status Report by the United States of 10 January 1997, WT/DS2/10 -the first status report presented by the US to the DSB "regarding implementation of the recommendations and rulings in the dispute regarding United States-Standards for Reformulated and Conventional Gasoline panel report (WT/DS2/R) and Appellate Body

Protection Agency (EPA) then had until 20 August 1997 to issue a new "Gasoline rule", a deadline that was respected by the US administration ⁽⁶¹⁾. Thus, from the date of the formal request for consultation until the compliance with the recommendations and the rulings adopted by the DSB, 31 months passed. On the contrary, of the cases settled directly, the longest was that on *EC Duties Imports of Grains*. In this case, the US requested consultations in July 1995 ⁽⁶²⁾, and then, on 30 April 1997, i.e. after 22 months, pursuant to the complete implementation of the agreement reached with the EC, the complainant announced the withdrawal of its request for a panel ⁽⁶³⁾. Thus, until now ^(63a), those countries that have been able to devise a solution to their case before the intervention of a third-body report have also achieved a (relatively more) timely settlement of their dispute.

A diplomatic solution also has the advantage of being an *ad hoc* arrangement to a specific case, agreed by the disputants after reaching a compromise between their opposing interests. Its content is not predetermined, the only general limit requested by the DSU being the consistency with WTO law ⁽⁶⁴⁾. Within that limit, WTO Members may devise the most appropriate solution: they may decide to simply withdraw the contested measure, to change it, to issue new acts so as to comply with WTO commitments, or to ask for a waiver or a modification of GATT or GATS Schedules.

At this purpose, the follow-up of the *Japan — Taxes on Alcoholic Beverages* case provides a good example. In this case the complainants, the EC, Canada and the United States, did not reach

report (WT/DS2/AB/R)", which was followed by 7 other status reports (WT/DS2/10/Add. 1, 2, 3, 4, 5, 6 and 7).

(61) See WT/DS2/10/Add. 7, 26 August 1997, reporting the US final status report communicated on 20 August 1997. The US informed Brazil and Venezuela that on the previous day, 19 August 1997, the EPA Administrator had signed the final regulation amending the one found in violation of GATT law.

(62) *European Communities-Duties on Imports of Grains*, Request for Consultations by the United States of 19 July 1995, WT/DS13/1.

(63) *European Communities-Duties on Imports of Grains*, Communication from the United States of 30 April 1997, WT/DS13/8. This dispute will be reported *infra*, para. 14.

(63a) 24 June 1998.

(64) See Article 3:7 DSU.

an amicable settlement with the respondent, Japan, on the consistency of the Japanese system of taxes on alcoholic beverages with GATT 1994. Therefore, they asked for a panel, whose report ⁽⁶⁵⁾ was appealed by Japan, but unsuccessfully, since the Appellate Body reaffirmed that the Japanese Liquor Tax Law was inconsistent with GATT Article III:2 ⁽⁶⁶⁾.

After the DSB adopted the panel report as modified by the Appellate Body report, the disputants had to agree on how to implement the DSB recommendations. In a short time Japan and the EC reached a "mutually accepted solution on modalities for implementation" according to which the Asian country was to comply with the WTO recommendations in three stages, the last one to be terminated by October 1 2001. Japan was also to reduce its tariffs rates on whisky and brandy for the longer implementation period granted for the new taxation scheme for shochu B ⁽⁶⁷⁾. However, no agreement was concluded between Japan and Canada, and Japan and the US. The US and Canada felt that the implementation time-period granted by the EC was excessive, and compensation offered by Japan inadequate: therefore, they continued to negotiate with Japan so as to obtain more suitable conditions. Canada and the US succeeded in their purpose at the end of 1997, when Japan promised to implement the DSB recommendations by October 1, 2000, and agreed, as a measure of compensation, to completely eliminate tariffs on all brown spirits (including whisky and brandy)

(65) *Japan-Taxes on Alcoholic Beverages*, Report of the Panel of 11 July 1996, WT/DS8/R, WT/DS10/R, WT/DS11/R. See *World Trade Report Condemns Japan Liquor Tax*, EC Press Release IP/96/635 of 11 July 1996.

(66) *Japan-Taxes on Alcoholic Beverages*, Report of the Appellate Body of 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R. See *Japanese Liquor Tax-Statement by the European Commission*, EC Press Release IP/96/890 of 4 October 1996.

(67) *Japan-Taxes on Alcoholic Beverages*, Mutually Acceptable Solution on Modalities for Implementation of 30 July 1997, WT/DS8/17, WT/DS10/17, WT/DS11/15. The notified solution has the form of an exchange of letters between the Japanese Minister of Finance (two letters, dated 16 and 18 December 1996), the Japanese Minister of Foreign Affairs (31 January 1997), and Sir Leon Brittan, Vice-President of the EC Commission (a letter dated 31 January 1997). See *EU and Japan Agree Outcome on Liquor Tax Dispute*, EC Press Release IP/97/84 of 4 February 1997.

and vodka, rum, liqueurs, and gin by April 1, 2002 ⁽⁶⁸⁾. The *Japan — Taxes on Alcoholic Beverages* case gives then a significant illustration of the different views on what had to be understood as the proper implementation of the DSB recommendations, and then on the various interpretations that the concept of compliance with WTO law may receive ⁽⁶⁹⁾.

It is evident that, through mutually agreed solutions, WTO Members maintain control over the interpretation and application of WTO law. Therefore, the choice of framing the DSU so as to guarantee the legal character of amicable solutions and to foster these diplomatic settlements fulfills two purposes: that of giving rise to the promptest and fully shared conclusion of a case, and that of allowing WTO Members “to retain the maximum amount of control over their dispute”, the feature which characterizes negotiations and which makes them the preferred means of settlement of international controversies ⁽⁷⁰⁾.

(68) *Japan-Taxes on Alcoholic Beverages*, Mutually Acceptable Solution on Modalities for Implementation of 12 January 1998, WT/DS8/19, WT/DS10/19, WT/DS11/17 (Agreement US/Japan), and *Japan-Taxes on Alcoholic Beverages*, Mutually Acceptable Solution on Modalities for Implementation of 12 January 1998, WT/DS8/20, WT/DS10/20, WT/DS11/18 (Agreement Canada/Japan). See *USTR Settles Successful WTO Case Opening Japanese Market for Distilled Spirits and Eliminating Discriminatory Taxes and Tariffs*, USTR Press Release 97-106 of 17 December 1997.

(69) By virtue of a clause inserted in the EC Commission letter of 31 January 1997, it was agreed with Japan that “the European Community will receive at least comparable tariff concessions to those which Japan may grant to the USA or Canada as a result of ongoing negotiations with these countries on compensation.” Consequently, as soon as Japan concluded the arrangements on the modalities for the implementation with the US and Canada, another exchange of letters, on 19 and 24 December 1997, took place between the Ambassador of Japan, Atsushi Tokinoya and the EC Commission Director General of DGI, Hans-Friedrich Beseler, through which Japan extended at the EC the better conditions for implementation granted to the US and Canada. See *Japan-Taxes on Alcoholic Beverages*, Mutually Acceptable Solution on Modalities for Implementation of 12 January 1998, WT/DS8/17/Add.1, WT/DS10/17/Add.1, WT/DS11/15/Add.1. Special thanks to Peter Wilkinson, President of the Confédération européenne des producteurs de spiritueux (CEPS) for the important information given on the *Japan-Taxes on Alcoholic Beverages* case.

(70) J.G. MERRILLS, *International Dispute Settlement*, cit., at p. 17. On the preference for the instrument of negotiations for settling international disputes see

It is not surprising then that the DSU demands that WTO Members constantly maintain a cooperative and constructive attitude when using its procedures: as was already stated in the 1979 *Understanding* ⁽⁷¹⁾, "requests for conciliation and the use of the dispute settlement procedures should *not* be intended or considered as *contentious acts* ... if a dispute arises, all Members will engage in these procedures *in good faith in an effort to resolve the dispute*" ⁽⁷²⁾. The open-mindedness towards a compromise and the research of it within the limits of WTO law have to be constant: not only during the consultations, to be undertaken "in good faith ... with a view to reaching a mutually satisfactory solution" ⁽⁷³⁾, but also during the possible subsequent stage of the DSU procedure, taking advantage especially of the panels' activity, which the DSU clearly requires to be oriented at reconciling the disputants. The *Understanding* even establishes two mandatory instances for the exchange of views of the disputants in light of the provisional results of the panel activity: a panel has to issue the descriptive (factual and argument) sections of its draft reports to the parties to the dispute, and then has to present the interim report, "including both the descriptive sections and the panel's findings and conclusions" ⁽⁷⁴⁾.

4. *The relativity of the short time limits provided for by the DSU.*

On first glance, the time limits features of the diplomatic phase of the DSU may appear to neutralize, or even openly contradict, its expressly declared preference for mutually agreed solutions, the duty undertaken by WTO Members "to strengthen and improve the

also F. CAPOTORTI *Corso di Diritto Internazionale*, Giuffrè, Milano, 1995, at p. 238. M. GIULIANO, T. SCOVAZZI, T. TREVES, *Diritto Internazionale-Parte Generale*, cit., pp. 507-508, and A. REMIRO BROTONS, R.M. RIQUELME CORTADO, J. DIEZ-HOCHLEITNER, E. ORIHUELA CALATAYUD, L. PÉREZ-PRAT DURBÁN, *Derecho Internacional*, McGraw Hill, Madrid, 1997, p. 831.

(71) *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, adopted on 28 November 1979, L/4907, in *BISD* 26S/210, at para. 9.

(72) Article 3:10, emphasis added.

(73) Article 4:3 DSU.

(74) Article 15 DSU.

effectiveness of the consultation procedures" (75) and not to consider the DSU procedures "as contentiuos acts", and the commitment "to engage in [the DSU] procedures in good faith in an effort to resolve the dispute".

The mere reading of Article 4:7 DSU, according to which "[i]f the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultation, the complaining party may request the establishment of a panel", coupled with the quasi-automatic adoption of panel and Appellate Body reports, may induce to think that recourse to the WTO dispute mechanism will inevitably lead to its adjudicatory phase, and hence that its procedures could be undertaken with the only purpose of obtaining a third-party binding decision. Indeed, two months starting from the day a party is notified are not always such a long time to develop and formulate adequate responses: thus it may frequently seem impossible for the party asked to enter into consultations to avoid defending itself in front of a panel by reaching an agreement during the very short period of consultations, that may even be shorter, since in cases of urgency it is reduced to 20 days (76).

These impressions may be rebutted first of all by underlining that, since 1947, 60-days has always been a very common time-measure within the GATT for solving trade matters (77), has been re-proposed by Uruguay Round's negotiators, put into force on a trial basis with the 1989 *Improvements* (78), and then chosen for a second time by the Marrakech's signatories: therefore, on the basis of the experience on the functioning of the GATT system since 1947, the States involved in the multilateral trade system have deemed that that amount of time was sufficient for the notified party to develop a proposal acceptable to the complaining party. Furthermore, it is highly probable that a very controversial issue will not be challenged for the first time under the DSU, coming out of the blue

(75) Article 4:1 DSU.

(76) See Article 4:8 DSU.

(77) See e.g. Article XXVIII GATT 1947.

(78) *Improvements to the GATT Dispute Settlement Rules and Procedures*, Decision of 12 April 1989 (L/6489), in *BISD* 36S/61.

totally unexpected: on the contrary, for the notified party, the attitude of the complainant towards its measure or, more generally, the problematic consistency of it with WTO, may be very well known, and also since a long time.

The proper and lasting functioning of any legal system lies in being founded on widely accepted rules, and in having an effective system capable of enforcing them. The birth of the WTO has been characterized by the widest acceptance, and it has been provided with instruments aimed at guaranteeing the continuity of the *consensus* achieved at Marrakech. However, the signatory Countries, being aware that it is not always possible in such a complex system and among so many and so different countries to achieve a common view on the interpretation and application of WTO law, and on the consistency of a given national measure or policy with it, have also agreed on a prompt dispute settlement mechanism, shaped as the tool capable of providing a third-party binding decision when the views of two or more Members on WTO law are really irreconcilable.

The continued acceptance of Marrakech law is maintained and strengthened through the remarkable WTO system of notification ⁽⁷⁹⁾, which is the pre-condition for the effective functioning of the Trade Policy Review Mechanism (TPRM) ⁽⁸⁰⁾. Both the WTO

(79) On the relevance of the duty to notify as an expression of the general principle of transparency see *infra*, para. 12.

(80) The TPRM is a WTO multilateral agreement devoted entirely to promoting analysis and discussion of the WTO Members trade policies and practices (see Annex 3 to the Agreement establishing the WTO). Its purpose "is to contribute to improved adherence by all Members" to WTO Agreements "and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members" (TPRM, paragraph A, *Objectives*, (i)). In order to realize that purpose, it sets up a Trade Policy Review Body which has the task of carrying out trade policy reviews on the basis of the reports provided by WTO Members and by the WTO Secretariat. Both reports are published together with the minutes of the TPRB meeting reviewing them, and the concluding remarks by the TPRB Chairman presented at the end of that meeting: "[t]he reports by the Member under review and by the Secretariat, together with the minutes of the respective meeting of the TRPB, shall be published promptly after the review" (TPRM, paragraph C, *Procedures for review*, (vi), emphasis added). The proceedings of the reviewing TPRB meeting are

notification system and the TPRM aim at analysing and developing debate on WTO Members specific measures and general policies even *before* they are adopted and implemented: their objective is establishing a meaningful confrontation among the contracting parties on their trade and trade-related measures and policies in order to identify possible divergencies on their compatibility with WTO law at the earliest stage.

If duly observed, these two instruments may encourage solutions and especially prevent the formation of pathological moments of the system, always representing a very delicate issue in the international context, especially in a multilateral and completely new framework like the WTO. After the notification of a draft measure or during the TPRM "regular collective appreciation and evaluation of the full range of individual Members' trade policies

of great interest: after the introductory remarks by the Chairman, there is the opening statement by the representative of the Country under review, briefly introducing the WTO Member report; then there are the statements by the first and the second discussant, and those by the WTO Members wishing to comment on the two reports, expressing all their perplexities about the national trade policies under consideration. The representative again takes the floor to respond to the points raised during the discussion, and also provides detailed answers to the written questions introduced by the WTO Members. Even if the TPRM "is not ... intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members" (TPRM, paragraph A, *Objectives*, (i)), its importance for the improvement of the multilateral system is fully recognized: Ambassador Jean-Pierre Leng, Former Permanent Representative of the EU at the WTO, declared in the opening statement to the 1995 trade review of the European Union that "[t]he EU was fully aware of the value of Trade Policy Reviews, which provided a *forum for collective policy assessment and evaluation*" (in Trade Policy Review, European Union, Vol. 2, 1995, at p. 88, emphasis added).

On the TPRM see J. H. J. BOURGEOIS, *GATT Surveillance of Trade-Related Policies: A Comment*, in E.U. PETERSMANN, M. HILF, (eds.) *The New GATT Round of Multilateral Trade Negotiations-Legal and Economic Problems*, 2nd ed., Kluwer, Deventer, 1991, pp. 157-161; P. C. MAVROIDIS, *Surveillance Schemes: The GATT's New Trade Policy Review Mechanism*, in *Michigan Journal of International Law*, Vol. 13, Winter 1992, pp. 374-414; A.H. QURESHI, *The New GATT Trade Policy Review Mechanism: An Exercise in Transparency or "Enforcement"?*, in *JWT*, 1990, no. 3, pp. 147-160. For an example of Trade Policy Review see the 1993 and 1995 Reviews on the EC: *Trade Policy Review, European Communities 1993, Voll. I and II*, Geneva, August 1993 and *Trade Policy Review, European Union 1995, Voll. 1 and 2*, Geneva, November 1995.

and practices" ⁽⁸¹⁾, different viewpoints on the consistency with the WTO of a national measure or policy may emerge. Many issues eventually brought before the DSU had already been pointed out at the review TPRB meetings. Therefore, the WTO system alerts "potential future defendants" of dissatisfaction felt by other parties towards their policies or measures. The severity of the time limits established for DSU consultations must be considered in light of these instruments which, together with the other DSU features illustrated below, impede to put into parenthesis the diplomatic phase ⁽⁸²⁾.

A final consideration: provided that the parties to a dispute agree, any time-limit established by the DSU may be ignored. Thus, if the complainant has policy reasons for not putting great pressure on the respondent, he may abstain from requesting a panel just after 60 days, with no negative consequence; likewise, if the matter raised is a very uncertain one, both disputants may choose to hold longer consultations, rather than immediately referring the case to a panel, whose outcome could be, because of the novelties characterizing the controversy, unpredictable. Therefore, provided that there are mutual advantages for the parties involved in the dispute, the DSU has been framed so as to allow them to "enjoy" the already underlined main feature of direct negotiations: that of maintaining the complete control on their course ⁽⁸³⁾.

(81) TPRM, paragraph A, *Objectives*, (i).

(82) Just to give here only some examples, we may refer of the statement made by Mexico, and shared by many other WTO Members, on the alleged inconsistency with Marrakech law of the US draft concerning modification to the US legislation on safeguards (see *DSB Minutes of Meeting* of 8 May 1996, WT/DSB/M/16, part 3), and of the warnings made by the EC with regard to US draft rules aimed at implementing the WTO Basic Telecommunications Agreement, warnings accompanied by the precision that if no change occurs, the EU "reserves its rights to challenge them under the WTO" (see *EU Presses US to Change Telecoms Rules*, EC Press Release IP/97/741 of 5 August 1997, and *EU Presses US Further to Change Satellites Rules*, EC Press Release IP/97/775 of 5 September 1997).

(83) See *supra*, footnote 70. The practice in the WTO settlement mechanism is very rich of consultations continuing far longer than 60 days: see e.g. the case *Korea-Measures Concerning the Testing and Inspection of Agricultural Products*, Request for Consultations by the United States of 6 April 1995, WT/DS3, or the

In only one case the extension of the time-limits established by the DSU may produce some effects. This happens when a panel has been established and has already started its work. In this case, the complaining party may ask for a suspension, but if the suspension period lasts for more than 12 months "the authority for the establishment of the panel shall lapse" ⁽⁸⁴⁾, with the consequence that, if the complainant still believes that the respondent is violating the WTO system, he will have to re-initiate the procedure of the panel request.

Just such a "suspension agreement" was reached between the EC and the US regarding the dispute over the Cuban Liberty and Democratic Solidarity Act, known also as the Helms-Burton Act ⁽⁸⁵⁾. The reasons behind this US legislation, and the opposite

complaint *Turkey-Restrictions on Imports of Textile and Clothing Products*, Request for Consultations by Hong Kong of 12 February 1996, WT/DS29, and almost all the disputes listed in Section 7, *Pending Consultations*, of the *Overview of the State-of-play of WTO Disputes* dated 24 June 1998. In the *Australia-Measures Affecting the Importation of Salmon* case, a year and a half passed between the demand of consultations (request by Canada of 5 October 1995, WT/DS18/1) and that of a panel (7 March 1997, WT/DS18/2). In that case, Canada decided to request the establishment of a panel only after Australia, in December 1996, completed a risk assessment study supporting the maintenance of its import ban on untreated fresh, chilled or frozen salmon from the US and Canada. (See the *DSB Minutes of Meeting* of 20 March 1997, WT/DSB/M/30, part 5 and the *DSB Minutes of Meeting* of 10 April 1997, WT/DSB/M/31, part 3, where Australia complained because Canada had not provided it with the opportunity to consult on the Australian salmon import risk analysis of 20 December 1996). Also the US requested consultations on the same Australian measures (see *Australia-Measures Affecting the Importation of Salmonids*, Request for Consultations by the US of 17 November 1995, WT/DS21/1), but then, instead of asking for a panel, decided to intervene as third-party participant in the Australia/Canada proceedings (cfr. USTR Fact Sheet *Monitoring and Enforcing Trade Laws and Agreements* of 30 September 1997, under the section *WTO Dispute Settlement-Enforcing US Rights under the WTO*, at p. 8). The WTO panel issued its report on 12 June 1998 (WT/DS18/R), concluding that the Australian measures were inconsistent with the SPS Agreement. The respondent also raised the argument of due process regarding the lack of discussion of the December 1996 Australian analysis: however it did not affirm that it entailed the inadequacy of consultations but rather a disequilibrium with regard to Canada in the time allotted before the panel for the preparations of the submissions. See para. 4.1 of the report, WT/DS18/R, cit.

(84) Article 12:12 DSU.

(85) *United States-The Cuban Liberty and Democratic Solidarity Act*, Re-

views it has originated on its political or commercial nature, and thus on the same possibility of bringing it under examination before the WTO, are very famous ⁽⁸⁶⁾; but here we are interested in the behaviour of the disputants under the DSU rules. Few months after the request for consultations, the EC asked for the establishment of a panel ⁽⁸⁷⁾. Bilateral meetings were always very intense, and were conducted with the aim to achieve a negotiated settlement, so as to halt or suspend the panel procedure ⁽⁸⁸⁾. In April 1997, it was possible to stipulate a settlement "suspending", not concluding, DSU proceedings. The two parties found common guidelines to

quest for consultations by the European Communities of 3 May 1996, WT/DS38/1. See also *EU Requests Consultations with the US on the Helms-Burton Legislation*, EC Press Release IP/96/387 of 3 May 1996. The EC began complaining in March 1995, against what was the draft of the future Helms Burton Act (see *EU to Oppose US Legislation on Cuba*, EC Press Release IP/96/200 of 5 March 1996, reporting the "various diplomatic steps ... including a protest by Sir Leon Brittan" taken by the EC during the preparatory works at the US Congress), and continued to draw attention to the alleged WTO inconsistency of the draft and then on the Helms-Burton law (see *Declaration by the Presidency on Behalf of the European Union Concerning Cuba*, EC Press Release PESC/95/34 of 5 April 1995; and *Declaration by the Presidency on Behalf of the European Union Concerning the Helms-Burton Bill*, EC Press Release PESC/95/92 of 11 October 1995).

(86) See A. BIANCHI, *Le recenti sanzioni unilaterali adottate dagli Stati Uniti nei confronti di Cuba e la loro liceità internazionale*, in *RDI*, 1998, pp. 313-391; B. M. CLAGETT, *Title III of the Helms-Burton Act Is Consistent with International Law*, in *AJIL*, 1996, pp. 434-440; *Id.*, *A Reply to Professor Lowenfeld*, in *AJIL*, 1996, pp. 641-644; *Helms-Burton and US National Security-Statement by Sir Leon Brittan*, EC Press Release IP/97/120 of 12 February 1997; A.F. LOWENFELD, *Congress and Cuba: The Helms-Burton Act*, in *AJIL*, 1996, pp. 419-433; T. MERON, D.F. VAGTS, *The Helms-Burton Act: Exercising the Presidential Option*, in *AJIL*, 1997, pp. 83-85; J.L. SNYDER, S. AGOSTINI, *New US Legislation to Deter Investment in Cuba*, in *JWT*, 1996, n. 3, pp. 37-44; B. STERN, *Vers la mondialisation juridique? Les lois Helms-Burton et D'Amato-Kennedy*, in *RGDIP*, 1996, pp. 979-1003. On the EC unilateral reaction to the Helms-Burton Act see A. LANG, *Le reazioni comunitarie alla legge americana Helms-Burton*, in *Il diritto dell'Unione europea*, 1996, pp. 1119-1121, and J. HUBER, *La réaction de l'Union européenne face aux lois américaines Helms-Burton et D'Amato*, in *RMCEU*, 1997, pp. 301-310.

(87) *United States-The Cuban Liberty and Democratic Solidarity Act*, Request for the Establishment of a Panel by the European Communities of 3 October 1996, WT/DS38/2.

(88) See *Helms-Burton Nomination of the WTO Panel-Statement by Sir Leon Brittan*, EC Press Release IP/97/143 of 20 February 1997.

follow to remove all their difficulties. The US Government did not abrogate its questioned laws, but only agreed to continue its suspension of their application and to consult with the US Congress in order to introduce other waivers: "[t]his is why we can only suspend the WTO Panel, and fully reserve our right, under the terms set out in the understanding with the US, to reinstate it if European interests are adversely affected by [their] implementation" (89). Along with the common confirmation of their commitment to continue their efforts to promote democracy in Cuba, the two parties agreed on the principles to promote in the context of the Multilateral Agreement on Investment (MAI) (90) or other appropriate international fora: the rules to be drafted "should inhibit and deter the future acquisition of investments from any State which has expropriated or nationalized such investments in contravention of international law, and subsequent dealings in covered investments" (91). The EU agreed to suspend the panel proceedings in

(89) *Helms-Burton Negotiations-Statement by Sir Leon Brittan*, EC Press Release IP/97/291 of 14 April 1997.

(90) The agreement is currently negotiated in the framework of the OECD. For a general overview of all the international instruments regarding foreign direct investments, included the negotiation underway, see *Trade and Foreign Investment*, Report by the WTO Secretariat of 9 October 1996, WTO Press/57.

(91) See the *Understanding Between the United States and the European Union* of 11 April 1997, in *ILM*, 1997, pp. 529-530 and its comment by A. LANG, *Nuovi sviluppi nella controversia CE-USA relativa alla legge Helms-Burton*, in *Il diritto dell'Unione europea*, 1997, pp. 506-509. The text of the Understanding was not notified to the WTO, where notice of the suspension, on request by the EC "[i]n the context of the negotiations for a mutually agreed solution to the present dispute", was given by the Chairman of the panel already set up (*United States-The Cuban Liberty and Democratic Solidarity Act*, Communication from the Chairman of the Panel of 25 April 1997, WT/DS38/5). See also the Press Release issued by the EU Council announcing the achievement of the "Understanding": *Helms-Burton and D'Amato: Council Conclusions*, PRES/97/110 of 21 April 1997.

The EU reported in October 1997 that it was not possible "to finalize" the EU/US consultations established by the Understanding, and that, given the circumstances, "a period of reflection is necessary in the expectation in particular of a more flexible approach by the United States" (*Conclusions of the Permanent Representative Committee of 16 October 1997, Subject: Helms-Burton/D'Amato*, EC Press Release PRES/97/301 of 20 October 1997). The US declared that progress was made in the negotiations, even if "significant differences do remain" (see E. GREEN, *US Reports Progress in EU Talks on Helms-Burton Issue-But*

light of those commitments, however announcing that it would "resume the panel procedure, or begin new proceedings" if the US applied its questioned laws to EU citizens and companies. Should the EU decide to pursue the issue within the WTO dispute mechanism, it must "notify the United States at least seven days in advance of making a written submission to the panel, and upon delivery of such submission [the] Understanding shall cease to have effect" (92).

The EC's "negotiation" of its right to suspend the panel procedure with the US is just one example of the positive effects that the DSU combination of strict time-limits and of third-party binding proceedings initiated by unilateral request has had on cooperation between WTO Members. As well as it happens with regard to all the dispute settlement mechanisms composed by a first mandatory negotiation phase, followed by a second, eventual, adjudicatory one (93), these DSU features, far from depreciating the WTO

"significant differences" remain, USIA Press Release No. 500 of 16 October 1997).

(92) *Understanding Between the United States and the European Union* of 11 April 1997, cit., paragraph entitled "WTO case."

(93) As it has been rightly observed, the existence of mandatory means for settling disputes has a beneficial preventive function, acting as a factor dissuading behaviours susceptible of giving rise to controversies ("l'esistenza di meccanismi di soluzione obbligatoria delle controversie ha una benefica funzione preventiva, agendo come fattore di dissuasione rispetto a comportamenti suscettibili di far sorgere controversie"). See M. GIULIANO, T. SCOVAZZI, T. TREVES, *Diritto Internazionale-Parte Generale*, cit., p. 505. The most important international trade agreements have a dispute settlement system composed of two phases, the first diplomatic, the second jurisdictional. The diplomatic phase is provided with time-limits so as to foster a clear attitude of the parties, and thus a prompt direct settlement. See, e.g., the Protocol of Brasilia for the Settlement of Disputes in the MERCOSUR of 17 December 1991 (see the text in *ILM*, 1997, pp. 691-699), which establishes that "States Parties to a dispute shall attempt to settle, first, by means of direct negotiations" which "shall not exceed a period of fifteen days after the date on which a complaint was initiated" unless otherwise agreed by the Parties (Article 3); if there is no agreement through direct negotiations, "any of the States Parties to a Dispute may submit it to the Common Market Group", which will evaluate the case, listen to the arguments of the Parties, request the advice of experts, and then make recommendations "with a view to resolving the controversy" (artt. 4 and 5); should the dispute still not be resolved, "any States Party to the Dispute may give notice to the Administrative Secretariat of its intention to make use of the Arbitral

Members' initiative when faced with controversies, have significantly improved the ability of WTO Members to work together to eliminate discrimination and obstacles to trade. Confronted with the delegation to the panels and the Appellate Body of the interpretation of the Marrakech system and the assessment of the consistency with it of national measures and practices, the contracting parties are making the most of the rights provided by the DSU discipline of the diplomatic phase ⁽⁹⁴⁾, and are trying to develop further mechanisms in order to settle cases at the very beginning, and thus to limit recourse to DSU procedures ⁽⁹⁵⁾.

Proceedings" (Article 7). On these procedures see P. CASELLA, *Integration of the Americas-An Overview*, in YEL, 1996, pp. 405-422; Id. *From Dispute Settlement to Jurisdiction? Perspectives for the MERCOSUL*, in E.U. PETERSMANN, (ed.) *International Trade Law and the GATT/WTO Dispute Settlement System*, Kluwer Law Publishers, The Hague, Boston, 1997, pp. 517-523; A. TOLEDANO LAREDO, *Les relations entre l'Union européenne et le MERCOSUR*, in RMUE, 1995, no. 5 pp. 17-30. See also Chapter XX of NAFTA (in ILM, 1993, pp. 693-698), devoted to the dispute settlement procedures, pursuant to which "[t]he Parties shall at all times endeavour to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation" (Article 2003). "If the consulting Parties fail to resolve a matter through consultations within ... 30 days of delivery of a request for consultations, ... 45 days ... if any other Party has subsequently requested or has participated in consultations regarding the same matter, ... 15 days ... in matters regarding perishable goods ... any such Party may request in writing a meeting with the Commission" (Article 2007). Should the intervention of the Commission not bring about the conclusion of the matter within 30 days after having been convened "any consulting Party may request in writing the establishment of an arbitral Panel" (Article 2008). With regard to NAFTA dispute settlement procedures see F.M. ABBOTT, *Law and Policy of Regional Integration: The NAFTA and Western Hemispheric Integration in the World Trade Organization System*, Martinus Nijhoff, Dordrecht, Boston, London, 1993, pp. 97-117; G. MARCEAU, *NAFTA and WTO Dispute Settlement Rules-A Thematic Comparison*, in JWT, 1997, no. 2, pp. 25-81; K.L. OELSTROM, *A Treaty for the Future: The Dispute Settlement Mechanisms of the NAFTA*, in *Law and Policy in International Business*, 1994, pp. 783-812; J.L. SIQUEROS, *NAFTA Institutional Arrangements and Dispute Settlement Procedures*, in *California Western International Law Journal*, 1993, pp. 383-394. For a suggestion to apply similar provision to the dispute settlement mechanism to be drafted for the ASEAN Free Trade Area (AFTA) see J.A. KAPLAN, *ASEAN's Rubicon: A Dispute Settlement for AFTA*, in *Pacific Basin Law Journal*, 1996, pp. 147-195.

(94) See *infra*, paras. 5, 6 and 7.

(95) See *infra*, para. 8.

5. *The consultations phase.*

a) *The evolution of the diplomatic phase since GATT 1947.*

The introduction of deadlines and of the full right to a panel are balanced by the major attention dedicated to the requirements to be fulfilled when requesting, entering and holding consultations. The current DSU regulation of consultations and the consequent interpretation it must receive in light of the system of checks and balances constructed by its drafters around the right to a panel, are not at all an innovation devised during the Uruguay Round, nor are they unique to the GATT/WTO system: on the contrary, they are a confirmation and a further consolidation of the constant trend known by the dispute settlement mechanism started in Geneva since 1947 in order to enforce multilateral trade law, that has also been utilized by other important economic cooperation agreements ⁽⁹⁶⁾.

The analysis of the legal texts that followed one another since the enter into force of the GATT, and of the panel reports requested to pronounce on the appropriateness of disputants' conduct during the diplomatic stages, reveals that the more the several stages for arriving at a binding panel report have been, with different degrees, removed from the control of GATT Members, the more the attention paid to the diplomatic phase has grown.

During GATT 1947, when the practice of *consensus* was followed at every stage of the settlement mechanism, Articles XXII and XXIII did not provide for any time limits, apart from a mere reference to "a reasonable time" for finding a satisfactory solution before requesting the intervention of the Contracting Parties; both Articles established a duty to enter into consultations with sympathetic consideration; in particular, Article XXIII required that "representations or proposals" for eliminating the nullification or impairment of GATT benefits, and for attaining any objective of the Agreement, be made in written form and "with a view to the satisfactory adjustment of the matter."

The 1979 Tokyo Round *Understanding Regarding Notification,*

(96) See *supra*, footnote 93.

Consultation, Dispute Settlement and Surveillance ⁽⁹⁷⁾ without eliminating the GATT Members' veto power, began to suggest a "normal" period of time within which a panel should be established ⁽⁹⁸⁾, or should complete the proceedings ⁽⁹⁹⁾. As it is clear from its name, this *Understanding* dwells, starting from its title, upon consultative procedures: it records the Contracting Parties reaffirmation of their resolve "to strengthen and improve the effectiveness" of consultations, to respond to their requests "promptly", to conclude them "expeditiously", and to conduct them "with a view to reaching mutually satisfactory conclusions." It is in order to fulfil these objectives that, for the first time, a Contracting Party is required to state the reasons on which the request for consultations is based ⁽¹⁰⁰⁾.

The Non Tariff Measures (NTM) Codes, also agreed in the Tokyo Round ⁽¹⁰¹⁾, had special settlement procedures, divided in three stages: consultations, conciliation and the panel procedure. It established time limits within which it was possible to ask the special Committee to set up a panel ⁽¹⁰²⁾. Again, the introduction of

(97) *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, adopted on 28 November 1979, L/4907, in *BISD* 26S/210.

(98) "The panel should be constituted as promptly as possible and normally not later than thirty days from the decision by the CONTRACTING PARTIES" (1979 *Understanding*, cit., at para. 11).

(99) "Although the CONTRACTING PARTIES have never established precise deadlines for the different phases of the procedure, probably because the matters submitted to panels differ as to their complexity and their urgency, in most cases the proceedings of the panels have been completed within a reasonable period of time, extending from three to nine months" (*Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2)*, annexed to the 1979 *Understanding*, in *BISD* 26S/215, para. 6 (ix). It must be noted that the GATT Members undertook to continue to abide by what they had recorded in the *Agreed Description* (see the 1979 *Understanding*, cit., at para. 7)).

(100) "Any request for consultations should include the reasons therefor." 1979 *Understanding*, cit., at para. 4.

(101) All the Tokyo Codes have been substituted by the new Agreements negotiated during the Uruguay Round, which now have the legal status of "multilateral" agreements, and so must all be subscribed by an international subject aiming at becoming a WTO Member.

(102) See the Article 14 of the Agreement on Technical Barriers to Trade, (known also as the Standards Code) in *BISD* 26S/8; Article VII of the Agreement

deadlines is balanced by more detailed rules for the consultations' phase, that the Parties to the Codes must carry out "mak[ing] their best effort to reach a mutually satisfactory solution" (103). Furthermore, a new diplomatic phase was introduced, to be conducted by the special Committees created under each NTM Code and composed of representatives from each of the signatories of those Agreements, thus also from the parties to the dispute. The diplomatic activity to be carried out by those Committees was defined as investigation "with a view to facilitating a mutually satisfactory solution" (104), and, simultaneously, as good offices and conciliation, encouraging the signatories involved "to develop a mutually acceptable solution" (105). If, within a certain period of time, no amicable settlement could be reached, any party to the dispute could request that the Committee establish a panel. Without doubt, the *Subsidies* Code had by far the most advanced dispute settlement system of the NTM Codes, since its time-limits were the most clearly

on Government Procurement, in *BISD* 26S/33; Articles 12, 13, 17 and 18 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (known also as the Tokyo Subsidies Code or the Subsidies and Countervailing Measure (SCM) Code), in *BISD* 26S/56; Articles 19 and 20 of the Agreement on the Implementation of Articles VII of the General Agreement on Tariffs and Trade, (known also as the Customs Valuation Code) in *BISD* 26S/116; Article 15 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (known also as the Tokyo Antidumping Code), in *BISD* 26S/171. On the consultations and dispute settlement provisions of these Agreements see T. FLORY, *Les Accords du Tokyo Round du GATT et la réforme des procédures de règlement des différends dans le système commercial interétatique*, in *RGDIP*, 1982, pp. 235-253; Id., *GATT Dispute Settlement after the Tokyo Round: An Unfinished Business*, in *Cornell International Law Journal*, 1980, Vol. 13, pp. 145-204; Id., *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, cit., pp. 55 ff.; T.P. STEWART, (ed.), *The GATT Uruguay Round-A Negotiating History (1986-1992)*, Kluwer Law and Taxation Publishers, Deventer, Boston, 1994, Vol. II, pp. 2699 ff.

(103) Article 17:2 of the Tokyo Subsidies Code and Article 15:4 of the Tokyo Antidumping Code.

(104) See Article 14:4 of Standards Code, Article VII:6 of the Agreement on Government Procurement and Article 20:1 of the Customs Valuation Code.

(105) See Article 17:1 of the Tokyo Subsidies Code and Article 15:3 of the Tokyo Antidumping Code.

defined. It had "time-locked procedures" ⁽¹⁰⁶⁾ also at the consultations stage, which was not the case for the other Tokyo Codes. After a deadline of one or two months without reaching a positive conclusion ⁽¹⁰⁷⁾, "any signatory party ... [could] refer the matter to the Committee for conciliation" ⁽¹⁰⁸⁾. The short time-limits were compensated by the requirement to introduce a detailed request for consultations, so as to not to undermine at all the possibility of solving the dispute at this very first stage but, on the contrary, to foster it. For a violation complaint, the request for consultations had to "include a statement of available evidence with regard to the existence and nature of the subsidy in question" ⁽¹⁰⁹⁾; for a non-violation complaint, the request had to "include a statement of available evidence with regard to (a) the existence and nature of the subsidy in question and (b) the injury caused to the domestic industry or, in the case of nullification or impairment, or serious prejudice, the adverse effects caused to the interests of the signatory requesting consultations" ⁽¹¹⁰⁾. It is evident that these detailed provisions all aim at focusing the dispute on legal-technical grounds, to be immediately illustrated in its prominent features so as to allow a serious "rule-oriented" confrontation from the very beginning of the procedure.

Ten years later, with the 1989 *Improvements to the GATT*

(106) R.E. HUDEC, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, cit., at p. 55. On the dispute settlement procedures of the 1979 Subsidies Code see also R. BEHBOODI R., *Industrial Subsidy and Friction in World Trade: Trade Policy or Trade Politics?*, Routledge, London, 1994, pp. 50 ff.

(107) The different period of time depends on the type of subsidy that is contested. In the case of an export subsidy considered inconsistent with the provisions of the Code (thus what is generally called in GATT /WTO law "violation complaint") a party may refer the matter to the Committee on Subsidies and Countervailing measures (disciplined by Article 16 of the Tokyo Subsidies Code) for conciliation after one month of consultations; when the subsidy is contested by a State either because it "causes injury to its domestic industry, nullification or impairment of benefits accruing to it under the General Agreement, or serious prejudice to its interests" (a "non-violation" complaint) the intervention of the Committee may be requested after two months of consultations. See Articles 12 and 13 the Tokyo Subsidies Code.

(108) See Article 13, paras. 1 and 2 of the Tokyo Subsidies Code.

(109) Article 12:2 of the Tokyo Subsidies Code.

(110) Article 12:4 of the Tokyo Subsidies Code.

Dispute Settlement Rules and Procedures ⁽¹¹¹⁾, the CONTRACTING PARTIES introduced a time-limit also for the disputes regarding the General Agreement, within which it was possible to ask the General Council to establish a panel. The complaining party could make its request after 60 days of unsuccessful consultations, reduced to 30 days “[i]n cases of urgency, including those which concern perishable goods en route” ⁽¹¹²⁾. Furthermore, the terms of reference for the panel were completely defined by the complainant unless agreement with the respondent is not reached on different terms within twenty days of the establishment of the panel ⁽¹¹³⁾. Unlike the 1979 Codes, these rights were not balanced by the introduction of a further mandatory multilateral diplomatic stage in the dispute mechanism, be it investigation or good offices — conciliation. The GATT Members opted to keep a two-step process for the settlement of their controversies, and so strengthened the consultation phase. Not only was “[a]ny request for consultations [to] be submitted in writing and ... give the reasons for the request”, it also had to be “notified to the Council” by the complaining party ⁽¹¹⁴⁾, so that prompt information was provided to interested third parties, who could then ask to join the consultations and maintain some control over any matter of particular interest also for them and thus contribute to the interpretation and application of GATT matters. Other time-limits were established for replying to the request and for entering into consultations. Furthermore, any such consultations had to be conducted “in good faith ... with a view to reaching a mutually satisfactory solution” ⁽¹¹⁵⁾.

b) *The value of consultations in the 1994 DSU.*

As noted above, the DSU provides for the full right to third-party body binding proceedings. However, recourse to adjudicatory

(111) *Improvements to the GATT Dispute Settlement Rules and Procedures*, Decision of 12 April 1989 (L/6489), in *BISD* 36S/61.

(112) See 1989 *Improvements*, at para. C. 2 and 4.

(113) See 1989 *Improvements*, at para. F.(b) 1.

(114) See 1989 *Improvements*, at para. C. 3.

(115) See 1989 *Improvements*, at para. C. 1.

procedures is not at all unconditional. In fact WTO Agreements — and the DSU in particular — reveal that WTO Members have carefully balanced their renunciation of the veto power ⁽¹¹⁶⁾.

(116) Various rules are devoted to limiting the discretionary power that may be exercised by the WTO panels and Appellate Body endowed with the authority to issue binding decisions. It is clearly stated that the aim of the WTO dispute settlement mechanism must be to “preserve the rights and obligations of Members under the covered agreements, and clarify the existing provisions of those agreements”; that the third-party bodies are to interpret WTO law “in accordance with customary rules of interpretation of public international law”; that neither these third-party bodies, through their reports, nor the DSB when adopting recommendations and rulings based on those reports, can “add to or diminish the rights and obligations provided in the covered agreements” (see Articles 3:2 DSU and 19:2 DSU). The will to allow WTO third-party bodies only a restricted discretionary activity in defining the scope of the Marrakech rules is further clearly expressed by the joint reading of Article 3:9 DSU — according to which “[t]he provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement” — and of Article IX:2 WTO — establishing that “[t]he Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.”

The Appellate Body itself has been conceived as an instrument to balance the power of panels: since it is impossible to correct or to reject a final panel report on the basis of a veto, a right of appeal on issues of law has been framed, so that a party to a dispute will have the possibility to challenge panel findings in front of an independent permanent judicial body.

Moreover, Article 17.6 of the WTO Anti-Dumping Agreement has introduced a “standard of review” to be respected by panels when assessing anti-dumping matters, imposing a certain “degree of deference ... to the determinations of national authorities”, which cannot be overturned by panels if their evaluation of the facts is unbiased and objective and if they fall into one of the possible interpretations of WTO anti-dumping law. It must be recalled here that during the Uruguay Round the “Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994” was adopted, according to which the standard of review of Article 17:6 of the Anti-dumping Agreement “shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application.” This is another sign of the great attention paid by WTO Members with reference to their renunciation of the veto power. With regard to the standard of review see J. GOMULA, *The Standard of Review of Article 17.6 of the Anti-Dumping Agreement and the Problem of Extension to other WTO Agreements*, Hague Academy of International Law, 1997 Research Centre, English Speaking Section. The text of the Decision is in *The Results of the Uruguay Round of Multilateral Trade Negotiations-The Legal Texts*, cit., p. 453.

In our opinion, the central element established by WTO Members to balance their renunciation of the veto power is represented by the conditions to be fulfilled so as to pass from consultations to adjudication. As it was already stated by the 1989 *Improvements*, if a WTO Member does not answer to a request or does not enter into consultations within certain time-limits, or if there is no agreement after an established period, the complainant may ask for a panel ⁽¹¹⁷⁾. Of course, it is also restated the well known pre-WTO duty to conduct consultations "in good faith ... with a view to reaching a mutually satisfactory solution" ⁽¹¹⁸⁾. The DSU's innovation lies in its requirements for the notification of a request for consultations, including instructions on how the request is to be drafted. Requests for consultations must "be notified to the DSB and to the relevant Councils and Committees by the Member which requests consultations" and must "be submitted in writing and ... give the reasons for the request, *including identification of the measures at issue and an indication of the legal basis for the complaint*" ⁽¹¹⁹⁾.

Once again, the scheme above presented ⁽¹²⁰⁾ is repeated: the renunciation of the veto power has produced more specific rules for the consultation phase. Given what is at stake — i. e. the power of interpretation and application of the WTO system, and of assessing whether a national measure or practice is consistent with it — the great attention that WTO signatory countries have paid to consultations entered under the DSU should come as no surprise ⁽¹²¹⁾.

(117) Article 4, paras. 3 and 4, DSU.

(118) See Article 4:3 DSU.

(119) See Article 4:4 DSU. Italics indicate those parts added at Marrakech to the text of the 1989 *Improvements*.

(120) See para. 5 lett. a).

(121) The greater importance of DSU consultations compared with previous GATT consultations was foreseen by Y. RENOUE, *Garantir les "Droits de la Défense"- Quelques Remarques Préliminaires sur la Nécessité de Développer les Règles de Procédure dans le Règlement des Différends de l'OMC*, in *La Réorganisation Mondiale des Echanges (Problèmes Juridiques)*, Colloque de Nice, Société Française pour le Droit International, Pedone, Paris, 1996, pp. 293-307, and at p. 321 and A. LIGUSTRO, *Le controversie tra Stati nel diritto del commercio internazionale: dal GATT all'OMC*, cit., pp. 516-517. For the positive results that

This is evidenced by the accuracy characterizing some official communications transmitted regularly to the DSB to record officially what has been carried out during the consultation stage ⁽¹²²⁾, and by the considerable number of claims based on the inappropriate implementation of the WTO rules regarding consultations. In fact, a WTO panel has the competence to assess a trade dispute only if consultations have been held according to the conditions indicated by the DSU: therefore consultations in compliance with the new requirements represent the legitimate “point of transition” ⁽¹²³⁾ from the DSU consultation phase to the DSU adjudicatory one.

The establishment of a panel in spite of its lack of competence caused by consultations not properly held constitutes a grave violation of the equilibrium established by WTO Members when accepting adjudication. It is evident that while accepting third party authority to settle a case, WTO Members framed consultations so as to create the best conditions for wisely deciding whether to let the case be decided by adjudication or to look for an amicable settlement. The written form of the request for consultations, which has to include “identification of the measures at issue and an indication of the legal basis for the complaint”, clearly aims at giving rise to serious and open communication between complainant and respondent: “the discussion should be specific enough to serve the purpose of the consultations, i. e., to give the complaining party an opportunity to explain the matter complained of, to give the responding party the opportunity to explain the basis for maintaining the measures and to provide the opportunity for the parties to reach a

consultations properly held may achieve, both within and outside international trade relations, see J. GOMULA, *Dispute Settlement under Association Agreements with Central and Eastern European States*, in *Polish Yearbook of International Law*, 1995-1996, pp. 107-128; M. MARESCAU, E. MONTAGUTI, *The Relations between the European Union and Central and Eastern Europe*, in *CML Rev.*, 1995, pp. 1327-1367, at pp. 1345 ff; and L.B. SOHN, *The Use of Consultations for Monitoring Compliance with Agreements Concluded Under the Auspices of International Organizations*, in N. BLOKKER, S. MULLER, (eds.), *Towards More Effective Supervision by International Organizations-Essays in Honour of Henry G. Schermers*, Martinus Nijhoff Publishers, Dordrecht, 1994, Vol. I, pp. 65-82.

(122) See *infra*, para. 7, lett. b).

(123) J. G. MERRILLS, *International Dispute Settlement*, cit., p. 17.

satisfactory adjustment of the matter before proceeding to a panel" (124).

If a disputant is dissatisfied with how DSU consultations were held, it may raise a procedural objection in front of the panel, which will have to examine carefully the allegations since its own competence may be legitimately founded only on adequate consultations conducted for the fixed period of time.

Some panels and the Appellate Body have dwelled upon consultations even if their adequacy was not within their terms of reference. In the two cases regarding textiles pursued through the panel and the Appellate Body stages, claims were introduced by the complainants regarding the infringement of the procedural requirements of Article 6 of the Agreement on Textiles and Clothing (ATC). In the *Underwear* case (125), Costa Rica considered that the United States had not respected the duty of prior consultations before issuing a transitional safeguard measure to Costa Rican trade in cotton and man-made fibre underwear, as provided by Article 6:7 ATC. The Panel did not decide on this issue because it was considered as absorbed by a substantial one. However, the Appellate Body did dwell on that provision. After having underlined that Article 6:7 ATC "requires that the request for consultations be accompanied by specific, relevant and up-to-date information on the factors which led the importing Member to make a determination of 'serious damage' ... and the factors which led to the unilateral attribution of such damage to an identified Member", the Appellate Body affirmed that "[o]ne clear objective of requiring a 60-day period for consultations is to give Member or Members a real and fair, not merely *pro forma*, opportunity to rebut or moderate those factors. The requirement of consultations is thus grounded on, among other thing, due process considerations; that requirement should be protected from erosion or attenuation by a treaty interpreter" (126).

(124) These are the arguments developed by the US on the purpose of DSU consultations in *Japan-Measures Affecting Consumer Photographic Film and Paper*, Report of the Panel of 31 March 1998, WT/DS44/R, para. 3.15.

(125) *United States-Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, Report of the Panel of 8 November 1996, WT/DS24/R.

(126) See *United States-Restrictions on Imports of Cotton and Man-Made*

In the so-called *Coconut* case ⁽¹²⁷⁾, the panel gave its interpretation of the value of the consultations disciplined by Article 4 DSU, even though not directly requested to do so. In fact, in this dispute, Brazil had initially refused to enter into consultations with the Philippines under the DSU because it claimed that the law applicable to the complaint — concerning the countervailing duty imposed by Brazil on imports of desiccated coconut from the Philippines — was not GATT 1994 (Articles I, II and VI) and the Marrakech Agreement on Agriculture (Article 13), but the Tokyo Subsidies Code. It is interesting to note that, even if the Panel accepted the Brazilian argument that its refusal to hold consultations could not be examined since it was not within the Panel's terms of reference, it nevertheless seized the opportunity to state the absolute importance and the mandatory nature of the duty of consultations within the DSU system. The Panel said that “[c]ompliance with the fundamental obligation of WTO Members to enter into consultations where a request is made under the DSU is vital to the operation of the dispute settlement system ... [i]n our view ... *Members' duty to consult is absolute*, and is not susceptible to the prior imposition of any terms and conditions by a Member” ⁽¹²⁸⁾.

c) *Mistakes regarding the definition of the legal content of DSU consultations in the Banana Panel Report.*

The first panel which was called upon to assess whether disputants had held “adequate consultations” was that appointed for the Banana case ⁽¹²⁹⁾. This procedural issue of “the adequacy of consultations” was raised by the European Community.

Fibre Underwear, Report of the Appellate Body of 10 February 1997, WT/DS24/AB/R, Part IV, pp. 14-15.

(127) *Brazil-Measures Affecting Desiccated Coconut*, Report of the Panel of 17 October 1996, WT/DS22/R. This case has also been appealed: *Brazil-Measures Affecting Desiccated Coconut*, Report of the Appellate Body of 21 February 1997, WT/DS22/AB/R.

(128) See Part B of the Findings of the *Coconut* Panel report, WT/DS22/R, at p. 77, emphasis added.

(129) *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Report of the Panel of 22 May 1997, WT/DS27/R/USA.

After the request introduced by Ecuador, Guatemala, Honduras, Mexico and the United States on 5 February 1996 ⁽¹³⁰⁾, consultations were held with the EC on 14 and 15 March 1996. The defendant claimed that during those two half-day sessions it was not possible to address all the questions regarding the consistency of the EC banana regime with WTO law; nor were the points discussed during the consultations thoroughly examined, the time being spent by the Complaining Parties mainly "reading out identical statements." The EC considered those consultations "highly perfunctory", since they did not fulfil "their minimum function of affording a possibility for arriving at a mutually satisfactory solution" ⁽¹³¹⁾.

In our opinion, the Complainants did not properly rebut the EC's claim on the inadequacy of consultations. They merely stated that during the consultation phase "a detailed seven-page joint statement and a hundred questions detailing the many aspects of the EC Banana regime about which they had concerns" ⁽¹³²⁾ had been provided: they did not specify exactly at what point of the consultations those documents had been introduced and, above all, they were silent on how they discussed the joint statement and the 100 questions during the consultations. Thus, we do not have the Complainants' view on if and how all the claims subsequently referred to the panel were previously discussed in good faith during consultations. The following part of their defense on the procedural point raised by the EC drove the attention at what happened *outside* that specific DSU procedure ⁽¹³³⁾:

(130) *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Request for Consultations by Ecuador, Guatemala, Honduras, Mexico and the United States of 5 February 1996, WT/DS27/1.

(131) WT/DS27/R/USA, para. II.5. The EC refers to "mutual promises" (at II.9 and II.18) made during the consultations to reply to all the questions raised by the documents introduced at this preliminary stage, afterwards not respected by the Complainants. We think that those "mutual promises" could be enforced by the EC against the 60-days time limit invoked by the Complainants, of course provided that there were objective and unequivocal elements proving the undertaking of those agreements — for instance, a procès-verbal, a transcript of the meeting signed by all the parties.

(132) WT/DS27/R/USA, para. II.12.

(133) Other DSU consultations were held on the EC Banana Import Regime (*European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Request for Consultations by Guatemala, Honduras, Mexico and the

“in any event” ⁽¹³⁴⁾, said the Complainants, the Banana dispute was a very well-known and controversial case in international trade, that dates back to 1991, had gone through two unadopted GATT 1947 panel reports ⁽¹³⁵⁾, and is widely contested also within the EC ⁽¹³⁶⁾.

United States of 28 September 1995, WT/DS16/1), but Ecuador, complainant in procedure WT/DS27, was not party to that procedure. The parties to procedure WT/DS16/1 agreed to re-exchange the questions and answers which took place during their consultations in order to enable Ecuador to obtain that reserved material. However, the EC observed that “[s]uch re-exchange of questions and answers did not take place”: thus, in EC’s opinion, “these questions and answers were not part of the consultation and did not form a basis for the present dispute settlement procedure.” WT/DS27/R/USA, para. II.4.

(134) WT/DS27/R/USA, para. II.12.

(135) *EEC-Member states’ import regimes for bananas*, Report circulated on 3 June 1993, DS32/R and *EEC-Import regime for bananas*, Report circulated on 11 February 1994, DS38/R.

(136) Germany is playing the leading role in the battle against the EC common organization on the banana market. As soon as the EC Council approved in 1993, by qualified majority, Regulation no. 404/93 (in *OJEC* L47/1 of 25 February 1993) implementing the banana regime, Germany requested the suspension of that measure (*Federal Republic of Germany v. Council of the European Union*, case C-280/93R [1993] *ECR* I-3667) as well as its annulment (*Federal Republic of Germany v. Council of the European Union*, case C-280/93 [1994] *ECR* I-4973).

As it is well known, on 28 and 29 March 1994, the EC succeeded in reaching an agreement with Colombia, Costa Rica, Nicaragua and Venezuela through which these banana-producing countries accepted the new EC regime. This Framework Agreement was incorporated and annexed to Schedule LXXX of GATT 1994, and thus signed at Marrakech like all the other commitments undertaken during the Uruguay Round. Germany asked the EC Court of Justice to give its opinion on the consistency of that Framework Agreement with the EC system (Opinion 3/94, [1995] *ECR* I-4577). Then, when voting on EU Council decision 94/800 concerning the conclusion on behalf of the Community of the Marrakech Agreements (on this decision see *infra*, para. 15 lett. b), the German Government made it clear, in a declaration entered in the minutes of the Council meeting adopting that decision, that “notwithstanding its approval ... the Federal Government considers the Framework agreement [on bananas] to be illegal” and that that approval “cannot be interpreted as approval” of the Framework Agreement. Finally, Germany asked the Court of Justice to annul the Council decision approving the Uruguay Round results “to the extent that the Council thereby approved the conclusion of the Framework Agreement on Bananas.” On 20 March 1998, the Court of Justice accepted in part the German claim, annulling the Council Decision no. 94/900/EC “to the extent that [it] approved the conclusion of the Framework Agreement ... in so far as that Framework Agreement exempts Category B operators from the export-licence system for which it provides” (*Federal Republic of Germany v. Council of the*

These particular circumstances, occurring outside the DSU framework, seem to be presented by the Complaining Parties as healing their eventual procedural deficiencies at the consultation stage, and as justifying the hurry to set up a panel without paying so much attention at the adequacy of consultations, since previous experience gave constant proof of the impossibility of reaching an agreement on the controversial issue of the EC banana regime. However, this quite exceptional situation cannot possibly justify any derogation from the observance of the DSU procedures. The choice of submitting a case under the DSU implies the complete respect of all the aspects of the two-stage procedure: the DSU requires consultations to be held within its framework according to its principles, they cannot be substituted by the fame of the case or by other consultations held outside the DSU, nor even by consultations always held under the DSU but in another complaint, where not all the parties coincided.

Apart from lacking in the factual description of the consultations, the Complainants' defense is particularly weak when identifying and interpreting the DSU rules establishing the behaviour to be followed by the disputants during DSU consultations. Very surprisingly, the Complainants affirmed that the obligation established by Article 4:2 DSU, according to which the Member requested to enter into consultations has "to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member", was "not reciprocal" ⁽¹³⁷⁾. This affirmation is erroneous and leads to an alarming implication.

The error lies in the fact that paragraph 2 of Article 4 DSU is a specification — addressed to Members whose measures are deemed incompatible with the Marrakech system — of the general commitments took upon by all WTO Members "to strengthen and improve the effectiveness of the consultation procedures employed by Members" ⁽¹³⁸⁾ and to "engage in the DSU procedures in good faith in an

European Union, case C-122/95, judgment of 10 March 1998, [1998] ECR I-973).

(137) WT/DS27/R/USA, para. II.11.

(138) Article 4:1 DSU.

effort to resolve the dispute" (139). It is inherent to these general obligations "to accord sympathetic consideration" and to "afford adequate opportunity for consultation." The fact that this particular aspect of the duty to "engage in the DSU procedures in good faith in an effort to resolve the dispute" has not been expressly stated also for the complaining party cannot be considered as exempting it from according the same "sympathetic consideration" and "adequate opportunity for consultation": such an interpretation would be equivalent to the depleting of any sensible meaning of what undertaken by drafting and then signing provisions like Articles 4:1 and 3:10 DSU. The strengthening and improvement of the effectiveness of consultations cannot be realized unilaterally, but only if *all* the WTO Members involved observe the obligation of engaging in the DSU procedures "in good faith in an effort to resolve the dispute." Without mutual consent (140), the DSU does not allow to jump the consultation phase so as to immediately and directly accede to third-party adjudication: both parties then, are required "to consult", not just to wait for the passing by of 60 days for the setting up of a panel. Any party suffering from the non-cooperative attitude of the counterpart is recognized the right to claim this non-WTO consistent behaviour, which impedes a panel to assess the case brought before it.

The alarming implication is the following: by holding that only the party requested to enter into consultations is "obliged to accord ... sympathetic consideration and afford adequate opportunity for consultation regarding representations made by the Complainants", and by failing to furnish enough detail in reporting how and when the defendant was provided with statements and questions during the consultations, thus not totally and convincingly rebutting the "perfunctoriness" of the consultations alleged by the EC, the Com-

(139) Article 3:10 DSU.

(140) Article 4:7 DSU establishes a right to the establishment of a panel after 60 days of consultations. This time limit may be ignored if "the consulting parties jointly consider that consultations have failed to settle the dispute" before the expiration of that deadline.

plaining Parties seem to admit their own insufficiency during the DSU consultations.

Immediately after having affirmed that the obligation "to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations" is not "reciprocal", but is incumbent only on the respondent, the Complaining parties cited Article 4:5 DSU, according to which "[i]n the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter." By appealing to the wording of that provision ("should" instead of the more solemn and forceful "shall"), they underlined that the obligation of the disputants to reach an amicable settlement of their case is not an absolute undertaking, and therefore does not "require that Members succeed in settling matters bilaterally" ⁽¹⁴¹⁾. We think that what stated by the Complainants is obvious: the DSU establishes a duty to enter into consultations in good faith with a view to reaching a mutually satisfactory solution ⁽¹⁴²⁾, not a duty to settle the dispute bilaterally, thus a *pactum de consultando* ⁽¹⁴³⁾, not a

(141) WT/DS27/R/USA, para. II.11.

(142) Article 3:10 DSU.

(143) The usual distinction in international law is between a *pactum de negotiando* (and not *de consultando*) and a *pactum de contrahendo*. In the WTO system, as in the GATT 1947 system, both the duty to negotiate and that to consult are contemplated. The content and the consequences in case of positive or negative outcomes are more or less the same, i. e. the obligation to negotiate or to consult with a view to reach a mutually satisfactory solution (content), and an agreement or the recourse to binding third-party decisions or to a unilateral measure (positive or negative consequences); the different terminology reflects the different objects of negotiations and consultations. In fact the object of negotiations is the change of a WTO commitment; that of consultations is to determine the consistency of a national measure or practice with WTO law. The provisions regarding consultations in the WTO are widely commented throughout the text; for examples of WTO provisions regarding negotiations, see Article XXVIII GATT 1994 and Article XXI GATS. The first provision, to be read in conjunction with the *Understanding on the interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994*, allows the modifications and the withdrawals of Schedules of the goods, subject to prior agreements with interested WTO Members or, in the impossibility of an amicable settlement, the modification or the withdrawal of "substantially equivalent concessions initially negotiated with the modifying Member" (on the

pactum de contrahendo (144). This is also demonstrated by the title given by the EC to its preliminary claim, which refers to the adequacy of consultations, and not to the failure of settling amicably the dispute.

The legal content of the DSU duty of consultations, i. e. of the right to proper consultations to which each disputing party is entitled, must be construed on the basis of the provisions expressly devoted to consultations, to be considered in light of the type of settlement mechanism that the DSU aims at setting up and of the equilibrium the DSU intends to realize. It is clear that the DSU provides for a two-step system, the first consisting of potentially limited in time direct consultations; their failure to settle a dispute within 60 days is "the only prerequisite for requesting a panel" (145)

scope and the procedures of Article XXVIII see T. FLORY, *Le GATT-Droit international et commerce mondial*, LGDJ, Paris, 1968, at pp. 60 ff.; E. MCGOVERN, *International Trade Regulation*, Exeter, Globefield Press, §5.132). The second rule, Article XXI GATS, always disciplines modifications or withdrawals of Schedules, but with reference to services. The difference from the provision on goods is that in the absence of agreement between the modifying party and any "affected Member" (this is the expression used by Article XXI GATS to indicate the Country whose benefits are affected by the modification or the withdrawals of the Services Schedules), "such affected Member may refer the matter to arbitration" (Article XXI, para. 3 (a) GATS). If the modifying Member does not respect the arbitration's findings, the affected Member "may modify or withdraw substantially equivalent benefits in conformity with those findings" (Article XXI, para. 4 (b) GATS). On Article XXI GATS see E. MCGOVERN, *International Trade Regulation*, cit., § 31, 213.

(144) The accord to conclude a further agreement entails a stronger commitment of best efforts than a simple duty to consult or to negotiate (on the legal content of the duty to negotiate in the obligation to reach an agreement see the International Court of Justice's ruling in the *North Sea Continental Shelf* case, reported *infra*, footnote 173). However, a *pactum de contrahendo* cannot "mean that either party [is] bound to make an agreement unsatisfactory to itself provided it did not act in bad faith", i. e., provided that there is no "intent to frustrate the carrying out of the provisions" contemplating the duty to stipulate a further agreement. See the Tacna-Arica arbitration (2 R.I.A.A., at 929-930) quoted and commented in M.A. ROGOFF, *The Obligation to Negotiate in International Law: Rules and Realities*, in *Michigan Journal of International Law*, 1994, pp. 141-185, at pp. 164-166.

(145) In a context that is quite debatable (see *infra* in the text) this affirmation made by the Banana panel, taken in isolation, is correct (WT/DS27/R/USA, para. 7.20).

on that same dispute, hence the passage to the second step of the DSU mechanism, that of third-party adjudication.

Unless the matter may be qualified as a case of urgency ⁽¹⁴⁶⁾, or if the parties agree on a different term ⁽¹⁴⁷⁾, the research for an amicable solution to the dispute must be pursued in good faith for 60 days. During that period, the parties involved in the controversy must not in any way harm the outcome of consultations: in a debate during the DSB meeting to discuss the legitimacy of the Canadian choice to submit its request for a panel in the *Scallops* case prior to expiration of the 60 days period ⁽¹⁴⁸⁾ it was rightly stated that a prediction that further consultations would not likely have been productive, as that inserted in the Canadian panel request, "diminished the rights of the other consulting party, particularly if the other party to the consultations had a different view of whether consultations could potentially settle the dispute" ⁽¹⁴⁹⁾. We agree with that opinion: the evaluation of the outcome of consultations has to be made at the expiry of the date established by the DSU, or otherwise directly agreed by the parties. Before that time, the consulting

(146) See Article 4:8 DSU.

(147) See Article 4:7 DSU.

(148) Canada had introduced its request for consultations on 19 May 1995, and that for a panel on 7 July 1995. Canada gave two justifications for its early request: first it deemed further consultations pointless, predicting their negative outcome (see *European Communities-Trade Description of Scallops*, Request for the Establishment of a Panel by Canada of 7 July 1995, WT/DS7/7; however, at the same time, Canada also circulated as cover note of this request another communication stating that it "will continue to pursue the settlement of this issue", see *Corrigendum*, WT/DS7/7/Corr.1); second, it remarked the coincidence between the 61st day following the consultations and the day of the DSB meeting (see the *DSB Minutes of Meeting* of 19 July 1995, WT/DSB/M/6, part 2). On the *Scallops* case see *infra*, para. 11.

(149) Statement by the US representative at the DSB meeting of 19 July 1995. See the *DSB Minutes of Meeting* of 19 July 1995, WT/DSB/M/6, part 2. The US representative further expressed his concern for the procedure followed by Canada, and stressed that the US decision not to prevent the establishment of the panel "did not constitute acceptance of the practice of circulating a request for the establishment of a panel prior to the expiration of the sixty-day consultation period." Of course, also the EC "deplored" Canada's early request, but it did not oppose to the establishment of the panel "given the urgent need expressed by Canada."

parties' activities must be completely devoted to finding a diplomatic solution to the case. A public statement on the unfruitfulness of consultations before the expiry of the time-limit is not consistent with the duty of good faith and of devising an amicable settlement ⁽¹⁵⁰⁾, nor with the commitment "to strengthen and improve the effectiveness of the consultations procedures" ⁽¹⁵¹⁾.

In short, consultations may be deemed "adequate" according to the requirements established by the DSU only if from their analysis there emerges a clear and constructive confrontation for the duration of the prescribed DSU periods. A different interpretation would equate the duty to consult to a duty to wait, which is totally inconsistent with the DSU's recognition that the "prompt" settlement of disputes is "essential to the effective functioning of the WTO" ⁽¹⁵²⁾, deprives of any meaning all the DSU rules devoted to the first stage of the procedure, and seriously violates the finely drawn equilibrium established at Marrakech with regard to the full right to a panel, counterbalanced by a right to adequate consultations aimed at fostering the possibility of prompt, positive, direct conclusion and at leaving to adjudication only those cases where divergent views on the interpretation of WTO rules are really impossible to reconcile.

The findings of the *Banana* Panel on this claim are of little help in reconstructing the facts, since they do not dwell upon how consultations on the EC banana regime had been actually carried out; and they cannot be accepted in their legal content, even if the great pressure felt by the panelists when asked to declare the nullity of the dispute on procedural grounds may easily be imagined ⁽¹⁵³⁾. The panel concluded that since "[c]onsultations are a matter reserved for the parties ... [where] no panel is involved ... [panelists]

(150) Article 4:3 DSU.

(151) Article 4:1 DSU.

(152) Article 3:3 DSU.

(153) We have already seen that the *Banana* dispute was almost a saga already within the GATT 1947 system as well as within the EC and, as it will be clearer *infra*, the serious claim of inadequate consultations was quite a surprise for the panel. However, these circumstances cannot obviously justify the faults in the legal reasoning of the panel.

are not in a position to evaluate the consultation process in order to determine if it functioned in a particular way"; in their view, "the function of a panel is only to ascertain that consultations, if required, were in fact held or, at least, requested" ⁽¹⁵⁴⁾. Regarding the statement that "[c]onsultations are a matter reserved for the parties", it is important to note that the same Article 1:1 DSU, when defining the jurisdiction of the Understanding, provides that the Understanding be "taken in isolation or in combination with any covered agreement." As already discussed, the DSU is quite detailed in describing the function of consultations and the spirit with which WTO Members have to act when using its procedures: there must be no "contentious" attitude, but "good faith in an effort to resolve the dispute" ⁽¹⁵⁵⁾. If a panel is asked to rule on whether these provisions have been respected, provided it has been given evidence of the parties' attitudes showed by the parties — for instance, signed records of the bilateral meetings held by them, official public statements, official press releases, declaration inserted in WTO meetings — the panel *is* and can be involved, and has to present its findings on those points. To behave differently, as did the panel in the *Banana* case, is an illegitimate denial of jurisdiction, and leaves the first step of the WTO dispute settlement system completely out of reach of a third-party body, a result opposite to that emerging from the DSU rules and, moreover, it prevents enquire on the fulfillment of the condition which legitimize the competence of a panel to assess a matter brought before it: to have held adequate consultations.

It is striking the difference from the case law of the International Court of Justice in assessing whether the preliminary conditions for the exercise of its jurisdiction have been fulfilled. In particular, with reference to negotiations, in the *Mavrommatis Case* ⁽¹⁵⁶⁾ and in the *South West Africa Cases* ⁽¹⁵⁷⁾ the ICJ was

(154) WT/DS27/R/USA, para. 7.19.

(155) Article 3:10 DSU.

(156) *Mavrommatis Palestine Concessions*, PCIJ, Series A, No. 2, p. 11.

(157) *South West Africa Cases*, Judgment of 21 December 1962, ICJ Reports 1962, p. 319.

asked to ascertain whether the disputes brought before her were within the meaning of the provisions contemplating the possibility to submit a case to her. According to Article 26 of the Mandate for Palestine and Article 7 of the Mandate for German South Africa, having the same wording, "[t]he Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, *if cannot be settled by negotiation*, shall be submitted to the Permanent Court of Justice" ⁽¹⁵⁸⁾. In both cases, the respondents raised a preliminary objection that there had been no negotiations with a view to the settlement of the controversy and thus the dispute before the Court could not be considered one which "cannot be settled by negotiation with the Applicants" ⁽¹⁵⁹⁾. The ICJ, far from considering negotiations as a matter reserved for the parties and from considering herself not in a position to evaluate the negotiation process, entered into a detailed analysis of the previous practice between the disputants, pointing out the content of letters, diplomatic notes, meetings. We think that the example of the ICJ should be followed by the WTO third-party bodies, since the ICJ has great experience in sophisticated and subtle preliminary objections raised by respondents to challenge its jurisdiction because of the lack of the prerequisites necessary for the legitimate exercise of its binding power over sovereign States ⁽¹⁶⁰⁾.

Nevertheless, among the observations made by the *Banana* panel there is a remark that we share, but that has not then been developed. The panel merely mentioned that the EC did not raise before the DSB the issue of the inadequacy of consultations, i. e. their lack of fulfilling "their minimum function of affording a possibility for arriving at a mutually satisfactory solution and a clear

(158) Emphasis added.

(159) *South West Africa Cases*, cit., p. 344.

(160) On the preliminary objections before the ICJ see the comment on Article 79 of the 1978 Rules of the International Court of Justice in S. ROSENNE, *Procedure in the International Court*, Martinus Nijhoff Publishers, The Hague, Boston, London, 1983, pp. 158 ff, and A. EYFFINGER, *The International Court of Justice, 1946-1996*, cit., pp. 138 ff.

setting out of the different claims of which a dispute consists" (161). This remark is significant. In fact, since WTO Members are to "engage in the [DSU] procedures in good faith in an effort to resolve the dispute" (162), and do not have to consider them as "contentious acts" (163), we think that any dissatisfaction with DSU consultations, if already realized before or during the panel request, should be declared in front of the DSB. The dissatisfied party should not wait for the opening of the panel proceedings so as to obtain the nullity of the entire procedure on the grounds of the inadequacy of DSU consultations, but should immediately communicate its negative views before the DSB at least when its counterpart requests the establishment of the panel, so that the complainant will have every possibility to assess the seriousness of the respondent's allegations and then make up its mind on its future conduct.

In the records of the meetings where the Complaining Parties requested the establishment of the Banana panel we find the expression of a certain dissatisfaction by the EC; however this may not be considered equivalent to the strong allegation subsequently introduced before the panel (164). The EC should have been clearer in that previous stage. Indeed, usually, and correctly, WTO Members

(161) WT/DS27/R/USA, para. 7.20.

(162) Article 3:10 DSU.

(163) See Article 3:10 DSU.

(164) In the first DSB meeting having on its agenda the request for a panel in the Banana case, it is noted that since consultations with the Complaining Parties were still "underway in an effort to find a mutually satisfactory solution, and contacts continued to be pursued ... [the EC] believed that it was not opportune to establish a panel at the present meeting as requested by the complaining parties" (*DSB Minutes of Meeting* of 24 April 1996, WT/DSB/M/15, Part 1, Statement by the EC representative); and, in the second DSB meeting it is recorded that even if the EC "did not oppose the establishment of the panel", it "regretted the timing of the request, since the Communities believed that the normal procedure of questions and answers in the consultations process had not been fully exhausted" (*DSB Minutes of Meeting* of 8 May 1996, WT/DSB/M/16, Part 1). The substantial difference between these remarks and the claim presented by the EC in front of the panel is evident (DSU consultations had not fulfilled "their minimum function of affording a possibility for arriving at a mutually satisfactory solution", *Banana panel report*, II.5); we also think that the defendant could already realize at the time of the DSB meetings, especially the second one, whether DSU consultations had been "highly perfunctory" (WT/DS27/R/USA, II.5).

pay a wise attention so as to avoid any misunderstanding of their activities within the Marrakech system. For instance, Brazil, when asked by the United States to enter into consultations with regard to certain measures affecting trade and investment in the automotive sector in and outside Brazil ⁽¹⁶⁵⁾, presented to the DSB a communication where it specified that its willingness to hold consultations did not “in any way, imply acceptance ... of the alleged violations of provisions cited in the request for consultations” ⁽¹⁶⁶⁾ by the United States. Analogously, the EC could have voted for the establishment of the panel, and, at the same time, made an official declaration at the DSB meeting, or even circulate a communication, informing that Body of its great dissatisfaction with how consultations had been performed by its counterparts.

6. *Appropriate identification of claims and facts at the consultations stage.*

We think that the definition of adequate DSU consultations has to be construed with the help of the adopted panel report in the pre-WTO *US-Norway Salmon* case ⁽¹⁶⁷⁾ and the WTO dispute in the *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products* case ⁽¹⁶⁸⁾.

In the *Salmon* case the US, challenged by Norway because of the imposition of anti-dumping duties on imports of fresh and chilled Atlantic Salmon, raised before the panel a preliminary objection of

(165) *Brazil-Certain Measures Affecting Trade and Investment in the Automobile Sector*, Request for consultations by the United States of 10 January 1997, WT/DS65/1.

(166) *Brazil-Certain Measures Affecting Trade and Investment in the Automobile Sector*, Communication from Brazil of 20 January 1997, WT/DS65/2.

(167) *United States-Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1994 (ADP/87).

(168) *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Panel of 5 September 1997, WT/DS50/R and *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Appellate Body of 19 December 1997, WT/DS50/AB/R.

admissibility of claims not raised by the complainant during consultations and conciliation.

The panel found that "for a claim to be properly before the Panel, it [not only] had to be within the Panel's terms of reference ... [but also] had to have been *identified* during prior stages of the dispute settlement process" (169). Thus, if the claim or claims were not discussed during consultations and conciliation, the two mandatory stages whose failure was necessary for the establishment of the panel, they could not be raised in the third phase of the procedure. The panel based this conclusion on the structure of the 1979 Antidumping Code (170), "a three-step process [consultations, conciliation and the procedure in front of the panel]... concerning a single 'matter' and the individual claims of which a matter is composed" (171), and thus on the function assigned to the two mandatory steps of the settlement mechanism preceding the final one. The requirement to initiate dispute settlement procedures by entering into consultations "with a view to reaching a mutually satisfactory solution of the matter" meant, according to the panel, that "the parties to a dispute were required to ... provide at least an opportunity for reaching a mutually satisfactory resolution of the matter in dispute" (172); the same interpretation had to be given to the duty imposed on the parties in the subsequent conciliation stage, led by the Committee, to "make their best efforts to reach a mutually satisfactory solution throughout the period of conciliation." The condition of giving to the parties "an opportunity to reach a mutually satisfactory resolution of the matter" before a Member could ask for a panel to issue a report on the dispute would not be "meaningful" (173) unless all the claims concerning the dispute had been

(169) *US-Norway Salmon* case, para. 338, emphasis added.

(170) It has to be reminded that the *Salmon* case was based on the 1979 Antidumping Code dispute settlement procedures, that we have presented *supra*, at para. 5, lett. a).

(171) *US-Norway Salmon* case, para. 332.

(172) *US-Norway Salmon* case, para. 333.

(173) The adjective used by the panel for defining appropriate consultations is the same used by the International Court of Justice with regard to the concept of proper negotiation. In the *North Sea Continental Shelf* case, the ICJ was asked to

raised in consultations and conciliation. The panel also took pains to indicate "the degree of precision" with which the claims are to be identified during the first two diplomatic steps of the mechanism: "at the start of the conciliation period" ⁽¹⁷⁴⁾ the accuracy of the identification of claims was similar to that required for a panel request, since quite a detailed examination of the case was requested from the Committee of conciliation, and an obligation of best effort to settle amicably the controversy was to be honoured by the parties; while "at the time of its request for consultations" the complaining party "could not be expected to define its specific claims with the same degree of precision" necessary for a panel request ⁽¹⁷⁵⁾.

These findings of the Panel in the *US-Norway Salmon* case have to be adapted to the new DSU system. The equilibrium established between disputants in the 1979 Antidumping Code is different from that in the DSU system: under the Code, there are time-limits, three

decide what were the applicable "principles and rules of international law" to the delimitation between the Federal Republic of Germany and Denmark and between the Federal Republic of Germany and the Netherlands of the areas of the continental shelf in the North Sea, principles and rules that subsequently would have been applied in the agreements that those States undertook to conclude to determine the boundaries among them. The ICJ, having ruled that the principles reflecting the *opinio iuris* in the matter of delimitation required that "delimitation ... be the object of agreement between the States concerned, and that such agreement ... be arrived at in accordance with equitable principles", defined in which way the parties had to fulfil their duty to negotiate in order to reach an agreement. When "the parties are under the obligation to enter into negotiations with a view to arriving at an agreement, ... [they are not] merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; *they are under an obligation so to conduct themselves that the negotiations are meaningful*, which will not be the case when either of them insists upon its own position without contemplating any modification of it" (*North Sea Continental Shelf*, Judgment, ICJ, Reports 1969, p. 3, para. 85 at 46-47, emphasis added). On the duty to negotiate see N.E. GHOZALI, *La négociation diplomatique dans la jurisprudence internationale-Essai d'analyse*, in *Revue Belge de Droit International*, 1992, pp. 323-350; N. NASSAR, *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-Term International Commercial Transactions*, Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1996, pp. 179 ff.; M.A. ROGOFF, *The Obligation to Negotiate in International Law: Rules and Realities*, cit..

(174) *US-Norway Salmon* case, para. 335.

(175) *US-Norway Salmon* case, para. 334.

phases, and individual Member States maintain their veto power on the final report; under the DSU, there are strict time limits, two phases (consultations and the panel - Appellate Body stage) and the right to a panel is complete. This change is reflected in the primary requirements to be fulfilled when requesting consultations under the DSU rules: a duty to notify the DSB and the relevant Councils and Committees, and to draft more completely the text of the request ⁽¹⁷⁶⁾, which the respondent is powerless to oppose ⁽¹⁷⁷⁾. By requiring a clear identification of the claims on which the dispute is based, the new Marrakech framework obliges the complainant to a deeper analysis of the inconsistency with WTO law of the measure or practice object of the consultations it is planning to ask within the DSU ⁽¹⁷⁸⁾.

Recently, in the dispute *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products*, the WTO Panel and then the Appellate Body were asked to assess also the behaviour of the respondent during the DSU consultations when requested to disclose facts regarding its implementation of certain WTO obliga-

(176) "Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint" (Article 4:4 DSU).

(177) We may here recall the delays encountered for establishing consultations between the EC and the US in the so called *DISC (Domestic International Sale Corporation)* case, due to the divergent views between complainant and respondent on the object that their consultations should have had. Asked on 4 February 1972 by the EC to enter into consultations to consider the consistency of its DISC law with GATT, the US refused because they wanted to discuss at the same time the GATT compatibility of the "territoriality" tax systems of France, Belgium and the Netherlands. It was not until February of 1976 that the five members of the panel were appointed. On this controversy, see R.E. HUDEC, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, cit., pp. 59-100 and J.H. JACKSON, *The Jurisprudence of International Trade: the DISC Case in GATT*, in *AJIL*, 1978, pp. 764-761.

(178) On the theme of adequate consultations see the arguments presented by the US in the GATT 1947 case *United States-Measures Affecting Alcoholic and Malt Beverages*, Report of the Panel adopted on 19 June 1992, DS23/R, in *BISD* 39S/206 (at paras. 3.1 ff.) and those presented by the US and Japan in *Japan-Measures Affecting Consumer Photographic Film and Paper*, Report of the Panel of 31 March 1998, WT/DS44/R (at paras. 3.12 ff). See also the technique recently adopted by the EC, presented *infra*, at the end of para. 7 a).

tions. In this case, the US had drafted its request for a panel on the basis of the Indian responses during the DSU consultations. From those answers it resulted — as was later confirmed also by the Panel after having looked over the internal record of consultations submitted by India — that the defendant had not spoken of any measure taken in order to fulfil the TRIPS obligation to implement a mailbox system allowing the filing and granting legal status to patent applications for pharmaceuticals and agricultural chemical products. However, in its first written submission to the panel, India claimed to have set up a valid mailbox system through unpublished “administrative practices.” Deeming that “if India has a valid system in place, its failure to make that system known to WTO Members is part of the problem” inducing to file a case before the WTO, the US, in its oral statement at the first substantive meeting of the parties with the panel, argued for the first time that India had also infringed Article 63 TRIPS which requires, *inter alia*, “the publication of any measure made effective by a Member pertaining to the subject matter of this agreement.” Of course, India requested the Panel to dismiss the new US claim on transparency since it was not mentioned in the panel’s terms of reference. But the third-party body, given the exceptionality of the case, accepted the new US’ argument on transparency ⁽¹⁷⁹⁾.

India appealed the panel’s conclusions on that point. The Appellate Body — after having underlined the “significant difference” between the claims, to be mandatorily identified in the panel request, and the arguments supporting them, which, by contrast, may be introduced and clarified also in the subsequent stages of the panel proceedings ⁽¹⁸⁰⁾ — accepted the India’s views ⁽¹⁸¹⁾. However, the acceptance of the Indian issue was followed by a sort of “lecture on litigation” regarding how to better serve due process in the WTO

(179) *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Panel of 5 September 1997, WT/DS50/R, at para. 7.13.

(180) *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Appellate Body of 19 December 1997, WT/DS50/AB/R, at para. 88.

(181) WT/DS50/AB/R, at para. 96.

dispute settlement system: for that purpose “standard working procedures that provided for appropriate factual discovery at an early stage in panel proceedings” should be adopted ⁽¹⁸²⁾. It seems to us that the Appellate Body, while having to sustain the Indian appeal on that procedural point on purely legal grounds because of the clear wording of Article 7 DSU, did not appreciate the respondent’s reticency during DSU consultations, and clearly felt it was inconsistent with the spirit of the DSU. Therefore, the Appellate Body suggested that the difference between claims and arguments should always be kept in mind, as an already available tool for reacting to behaviour similar to that of India, and pointed out the need for a better discipline on fact-finding in panel proceedings. Furthermore, the Appellate Body remarked: “[a]ll parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely. This must be so in consultations as well as in the more formal setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations. For the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings” ⁽¹⁸³⁾. And the Appellate Body went on with a phrase that in our opinion has a double reading: the “additional fact-finding cannot alter the claims that are before the panel — because it cannot alter the panel’s terms of reference” ⁽¹⁸⁴⁾. This affirmation can be understood to mean that claims are not be changed because of additional fact-finding; but, at the same time, additional fact-finding should not be accepted to the extent that it alters the claims which are before the panels.

(182) WT/DS50/AB/R, at para. 95.

(183) WT/DS50/AB/R, at para. 94.

(184) WT/DS50/AB/R, at para. 94.

7. WTO practice regarding consultations.

a) *The drafting of the request for consultations.*

Notwithstanding the examples of the *Banana* case and of the *India Pharmaceutical* case, the general overview of WTO Members' conduct during DSU consultations reveals that they clearly, and correctly, follow and diligently develop the views expressed in the panel report in the pre-WTO *US-Norway Salmon* case ⁽¹⁸⁵⁾.

It has thus become a practice almost always observed to introduce in the request for consultations a sort of catch-all clause in order to avoid that the procedure be unfruitful or inadequate as a consequence of a too formalistic impossibility to examine the measure or practice at stake in light of new claims, not indicated in the request, coming out during the consultations' process. In the great majority of the requests for consultations the following standard *formulae* are almost never left out: "the Government of ... reserves the right to raise *additional legal matters* [or *additional factual claims and legal matters, additional factual and legal matters* or *additional factual matters and legal claims*] during the course of the consultations" ⁽¹⁸⁶⁾, "reserves the right to raise

(185) *United States-Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1994 (ADP/87).

(186) *United States-Imposition of Import Duties on Automobiles From Japan Under Sections 301 and 304 of the Trade Act of 1974*, Request for consultations by Japan of 17 May 1995, WT/DS6/1; *Japan-Measures Affecting Distribution Services*, Request for consultations by the United States of 13 June 1996, WT/DS45/1 and *Japan-Measures Affecting Distribution Services*, Request for further consultations by the United States of 20 September 1996, WT/DS45/1/Add.1; *Brazil-Certain Measures Affecting Trade and Investment in the Automotive Sector*, Request for consultations by the United States of 9 August 1996, WT/DS52/1; *Indonesia-Certain Measures Affecting the Automobile Industry*, Request for consultations from Japan of 4 October 1996, WT/DS55/1; *Australia-Textile, Clothing and Footwear Import Credit Scheme*, Request for consultations by the United States of 7 October 1996, WT/DS57/1; *Indonesia-Certain Measures Affecting the Automobile Industry*, Request for consultations by the United States of 8 October 1996, WT/DS59/1; *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Request for consultations by the Philippines of 25 October 1996, WT/DS61/1; *European Communities-Customs Classification of*

additional legal claims that it considers relevant as a result of the discussions during consultations" (187), "reserves its rights to raise further claims and legal matters ... as deemed appropriate during the course of consultations" (188), "reserves its rights to raise any other issue concerning the case during the coming consultations" (189), or "reserves the right to present additional facts and

Some Computer Equipment, Request for consultations by the United States of 8 November 1996, WT/DS62/1; *United States-Anti-dumping Measures on Imports of Solid Urea From the Former German Democratic Republic*, Request for consultations by the European Community of 28 November 1996, WT/DS63/1; *Indonesia-Certain Measures Affecting the Automobile Industry*, Request for consultations by Japan of 29 November 1996, WT/DS64/1; *Brazil-Certain Measures Affecting Trade and Investment in the Automobile Sector*, Request for consultations by the United States of 10 January 1997, WT/DS65/1; *United Kingdom-Customs Classification of Certain Computer Equipment*, Request for consultations by the United States of 14 February 1997, WT/DS67/1; *Ireland-Customs Classification of Certain Computer Equipment*, Request for consultations by the United States of 14 February 1997, WT/DS68/1; *European Communities-Measures Affecting Butter Products*, Request for consultations by New Zealand of 24 March 1997, WT/DS72/1; *United States-Imposition of Antidumping Duties on Imports of Colour Television Receivers From Korea*, Request for Consultations by Korea of 10 July 1997, WT/DS89/1; *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, Request for Consultations by New Zealand of 16 July 1997, WT/DS93/1; *United States-Antidumping Duty on Dynamic Random Access Memory Semiconductor (DRAMs) of One Megabyte or Above From Korea*, Request for Consultations by Korea of 14 August 1997, WT/DS99/1; *Mexico-Anti-dumping Investigation of High-Fructose Corn Syrup (HFCS) From the United States*, Request for Consultations by the United States of 4 September 1997, WT/DS101/1; *Australia-Subsidies Provided to Producers and Exporters of Automotive Leather*, Request for Consultations by the United States of 10 November 1997, WT/DS106/1; *Canada-Measures Affecting Dairy Exports*, Request for Consultations by New Zealand of 29 December 1997, WT/DS113/1; *Mexico-Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Request for Consultations by the United States of 8 May 1998, WT/DS132/1. Emphasis added.

(187) *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, Request for Consultations by Canada of 16 July 1997, WT/DS92/1. Emphasis added.

(188) *Peru-Countervailing Duty Investigation Against Imports of Buses from Brazil*, Request for Consultations by Brazil of 23 December 1997, WT/DS112/1. Emphasis added.

(189) *Thailand-Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams From Poland*, Request for Consultations from Poland of 6 April 1998, WT/DS122/1. Emphasis added.

arguments during the consultations”⁽¹⁹⁰⁾; “the provisions of these [WTO] agreements with which these measures appear to be inconsistent *include, but are not limited, to ...*”⁽¹⁹¹⁾, include “*inter*

(190) *Slovak Republic-Measures Concerning the Importation of Dairy Products and the Transit of Cattle*, Request for Consultations by Switzerland of 7 May 1998, WT/DS133/1.

(191) *Korea-Measures Concerning the Testing and Inspection of Agricultural Products*, Request for consultations by the United States of 4 April 1995, WT/DS3/1; *Korea-Measures Concerning the Shelf-Life of Products*, Request for consultations by the United States of 3 May 1995, WT/DS5/1; *Australia-Measures Affecting Importation of Salmon*, Request for consultations by Canada of 5 October 1995, WT/DS18/1; *Korea-Measures Concerning the Bottled Water*, Request for Consultations by Canada of 8 November 1995, WT/DS20/1; *Australia-Measures Affecting the Importation of Salmonids*, Request for consultation by the United States of 17 November 1995, WT/DS21/1; *Pakistan-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Request for consultations by the United States of 30 April 1996, WT/DS36/1; *Portugal-Patent Protection Under the Industrial Property Act*, Request for consultations by the United States of 30 April 1996, WT/DS37/1; *United States-Tariff Increases on Products from the European Communities*, Request for consultations by the European Community of 17 April 1996, WT/DS39/1; *Brazil-Certain Automotive Investment Measures*, Request for consultations by Japan of 30 July 1996, WT/DS51/1; *Indonesia-Certain Measures Affecting the Automobile Industry*, Request for consultations from Japan of 4 October 1996, WT/DS55/1; *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Request for consultations by India, Malaysia, Pakistan and Thailand of 8 October 1996, WT/DS58/1; *Japan-Measures Affecting Imports of Pork*, Request for consultations by the European Communities of 15 January 1997, WT/DS66/1; *Philippines-Measures Affecting Pork and Poultry*, Request for consultations by the United States of 1 April 1997, WT/DS74/1; *Japan-Measures Affecting Agricultural Products*, Request for consultations by the United States of 7 April 1997, WT/DS76/1; *Ireland-Measures Affecting the Grant of Copyright and Neighbouring Rights*, Request for Consultations by the United States of 14 May 1997, WT/DS82/1; *Denmark-Measures Affecting the Enforcement of Intellectual Property Rights*, Request for Consultations by the United States of 14 May 1997, WT/DS83/1; *Sweden-Measures Affecting the Enforcement of Intellectual Property Rights*, Request for Consultations by the United States of 28 May 1997, WT/DS86/1; *United States-Measure Affecting Government Procurement*, Request for Consultations by Japan of 18 July 1997, WT/DS95/1; *United States-Measures Affecting Imports of Poultry Products*, Request for Consultations by the European Communities of 18 August 1997, WT/DS100/1; *Philippines-Measures Affecting Pork and Poultry*, Request for Consultations by the United States of 7 October 1997, WT/DS102/1; *Canada-Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Request for Consultation by the United States of 8 October 1997, WT/DS103/1; *European Communities-Measures Affecting the Exportation of Processed Cheese*, Request for Consultations by the United States of 8

alia"⁽¹⁹²⁾, "amongst others"⁽¹⁹³⁾, "in particular, but [or though] not necessarily exclusively"⁽¹⁹⁴⁾; finally, the complaining parties

October 1997, WT/DS104/1; *United States-Tariff Rate Quota for Imports of Groundnuts*, Request for Consultations by Argentina of 19 December 1997, WT/DS111/1; *Belgium-Certain Income Tax Measures Constituting Subsidies*, Request for Consultations by the United States of 5 May 1998, WT/DS127/1; *Netherlands-Certain Income Tax Measures Constituting Subsidies*, Request for Consultations by the United States of 5 May 1998, WT/DS128/1; *Greece-Certain Income Tax Measures Constituting Subsidies*, Request for Consultations by the United States of 5 May 1998, WT/DS129/1; *Ireland-Certain Income Tax Measures Constituting Subsidies*, Request for Consultations by the United States of 5 May 1998, WT/DS130/1; *France-Certain Income Tax Measures Constituting Subsidies*, Request for Consultations by the United States of 5 May 1998, WT/DS131/1; *European Communities-Measures Affecting Imports of Wood of Conifers from Canada*, Request for Consultations by Canada of 17 June 1998, WT/DS137/1. Emphasis added.

(192) *Malaysia-Prohibition of Imports of Polyethylene and Polypropylene*, Request for consultations by Singapore of 10 January 1995, WT/DS1/1; *Argentina-Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, Request for consultations by the United States of 4 October 1996, WT/DS56/1; *Guatemala-Antidumping Investigation Regarding Portland Cement from Mexico*, Request for consultations by Mexico of 15 Octobre 1996, WT/DS60/1; *Brazil-Certain Measures Affecting Trade and Investment in the Automotive Sector*, Request for Consultations by the European Communities of 7 May 1997, WT/DS81/1; *Peru-Countervailing Duty Investigation Against Imports of Buses from Brazil*, Request for Consultations by Brazil of 23 December 1997, WT/DS112/1. Emphasis added.

(193) *European Communities-Measures Affecting Importation of Certain Poultry Products*, Request for consultations by Brazil of 24 February 1997, WT/DS69/1; *Belgium-Measures Affecting Commercial Telephone Directory Services*, Request for Consultations by the United States of 2 May 1997, WT/DS80/1; *European Communities-Measures Affecting Asbestos and Products Containing Asbestos*, Request for Consultations by Canada of 28 May 1998, WT/DS135/1.

(194) *Mexico-Customs Valuation of Imports*, Request for consultations by the European Communities of 27 August 1996, WT/DS53/1; *Argentina-Measures Affecting Textiles, Clothing and Footwear*, Request for consultations by the European Community of 23 April 1997, WT/DS77/1; *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, Request for Consultations by the European Community of 18 July 1997, WT/DS96/1; *Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products*, Request for Consultations by the European Community of 12 August 1997, WT/DS98/1; *Pakistan-Export Measures Affecting Hides and Skins*, Request for Consultations by the European Communities of 7 November 1997, WT/DS107/1; *Brazil-Measures Affecting Payment for Imports*, Request for Consultations by the European Communities of 8 January 1998, WT/DS116/1; *United States-Harbour Maintenance*

may conclude the request for consultations by saying that they “are of the view that [the national measures] may not be in conformity with *at least* the following [WTO] provisions” ⁽¹⁹⁵⁾. These *formulae* clearly indicate that the WTO Members perceive the DSU consultations as a mandatory step requiring a serious, open and constructive confrontation on the consistency with WTO law, and with all the benefits deriving from WTO membership, of a certain national measure or practice.

Recently, the EC adopted a technique that, while demonstrating once more the clear perception of the WTO requirement of holding adequate DSU consultations, provides full protection against any misunderstanding on the claims raised during consultations: in fact, having realized that previously challenged national measures should be considered as infringing a WTO Agreement not indicated in its first request for consultations, the EC filed a second request, asking for the extension of consultations to the new legal basis ⁽¹⁹⁶⁾.

- b) *The richness of the consultations phase in the US/Japan dispute on autos and automotive parts and the Automotive Agreement settling the dispute.*

The most documented and interesting example of consultations held under the DSU is that regarding the first WTO dispute raised by Japan against the United States. It was the famous case on the Japanese treatment reserved to foreign motor vehicles and automo-

Tax, Request for Consultations by the European Communities of 6 February 1998, WT/DS118/1; *India-Measures Affecting Export of Certain Commodities*, Request for Consultations from the European Communities of 11 March 1998, WT/DS120/1. Emphasis added.

(195) *United States-The Cuban Liberty and Democratic Solidarity Act*, Request for consultations by the European Communities of 3 May 1996, WT/DS38/1; *United States-Antidumping Investigation Regarding Imports of Fresh or Chilled Tomatoes from Mexico*, Request for consultations by Mexico of 1 July 1996, WT/DS49/1. Emphasis added.

(196) See *United States-Tax Treatment for “Foreign Sales Corporations”*, Request for Consultations by the European Communities of 18 November 1997, WT/DS108/1 and *United States - Tax Treatment for “Foreign Sales Corporations”*, Request for Consultations by the European Communities of 4 March 1998, Addendum, WT/DS108/1/Add.1.

tive parts, which according to the Government of the United States did not provide adequate access to foreign products, and thus was discriminatory and distorted international competition ⁽¹⁹⁷⁾. Japanese treatment of the automotive sector had been analyzed for a long time under the bilateral Framework for a new economic partnership, established in July 1993 by Japan and the US ⁽¹⁹⁸⁾, so as to accomplish with particular reference to that economic area the goals of that 1993 Framework, i. e. "to increase access and sales of competitive foreign goods and services through market-opening and macroeconomic measures; to increase investment; to promote international competitiveness; and to enhance bilateral economic cooperation between the United States and Japan" ⁽¹⁹⁹⁾. The US became dissatisfied with the course of consultations held under the 1993 bilateral Framework and initiated its own investigation on 1 October 1994 under Section 302(b) (1) (a) of the Trade Act. Subsequently, deeming to be faced with a deadlock and thus the failure of 20 months of bilateral consultations, the American Government sent a letter to the WTO Director General Renato Ruggiero on 10 May 1995 "to give pre-filing notification of the intention of the United States to invoke the dispute settlement mechanism of the WTO" against Japan within 45 days, and officially announced its intention to retaliate so as to counteract to the Japanese restrictions or denial of access regarding US products. After six days, the USTR communicated a list of Japanese luxury cars on which the US would impose a 100 % duty, beginning on 28 June 1995, with retroactive effect from 20 May 1995, since it was from that date that the US

(197) See the statement made by Ambassador Mickey Kantor on 5 May 1995, reported in *Kantor: Japan Refuses to address US Concerns on Autos*, in [gopher://198.80.36.82.7... ge/archives/1995/pdq.95](http://gopher://198.80.36.82.7...ge/archives/1995/pdq.95), file id. 95050804. EEA of 8 May 1995.

(198) *Joint Statement on the United States-Japan Framework for a New Economic Partnership*, signed by the Heads of Government of Japan and the United States of America on 10 July 1993, in *ILM*, 1993, p. 1414 ff.

(199) The goals of the 1993 Framework were presented with these words in the *US-Japan Automotive Agreement and Supporting Documents* (Washington D.C., 23 August 1995), *Measures by the Government of Japan and the Government of the United States of America Regarding Autos and Autos Parts, I. Goals and General Policies*, para. A, in *ILM*, 1995, pp. 1482 ff., at p. 1494.

Customs Service would have withheld liquidation of entries of the chosen Japanese vehicles ⁽²⁰⁰⁾.

Japan reacted to the US "pre-filing notification", to its "affermative determination" of 10 May, and to the "measures announced" on 16 May 1995 by filing the day after its own request for consultations under the DSU rules ⁽²⁰¹⁾, moving out of position the US, that from actor had suddenly to take on the role of defendant on totally different claims.

In fact, US allegations were that Japan "[t]hrough its actions and inactions with respect to the automotive sector .. ha[d] failed to carry out its obligations under the WTO, ha[d] nullified and impaired benefits accruing to the United States under the WTO, and ha[d] fostered a situation in the automotive sector that nullifie[d] and impair[ed] such benefits, and impede[d] the attainment of important objectives of the GATT and the WTO" ⁽²⁰²⁾, so that Japanese measures and practices could be appraised under Marrakech law. Furthermore, "pursuant to Sections 301 and 304 of the Trade Act, USTR ha[d] made a determination that certain acts, policies and practices of Japan restrict or deny US auto parts suppliers access to the auto parts replacement and accessories market in Japan and are unreasonable and discriminatory, and burden or restrict US commerce" ⁽²⁰³⁾. Japan's complaint instead, challenged the compatibility of the announced US unilateral measures on the basis of some of the most relevant WTO provisions: according to the Asian Government, the 100% duty on 13 Japanese

(200) See the list of Japanese cars object of the US sanctions in the *Statement by Ambassador Kantor*, USTR Press Release No. 95-36 of 16 May 1995.

(201) *United States-Imposition of Import Duties on Automobiles From Japan Under Sections 301 and 304 of the Trade Act of 1974*, Request for Consultations by Japan of 17 May 1995, WT/DS6/1.

(202) See the *Communication from the United States* of 10 May 1995, WT/INF/1, the letter from USTR Mickey Kantor to WTO Director General Renato Ruggiero concerning the "pre-filing notification" of the US Government to invoke the DSU mechanism against Japan for the automotive dispute.

(203) See the statements made by Mickey Kantor at the press conference on "Trade with Japan" held at the White House briefing room on 10 May 1995 and reported in *Kantor: US Will Retaliate Against Japan Auto Trade Barriers*, in gopher://198.80.36.82.7...ge/archives/1995/pdq.95, file id. 95051004.EEA, of 10 May 1995, at p. 3.

luxury cars infringed a) the principle of the most favoured nation enshrined in Article I GATT 1994, since they targeted only Japanese goods; b) Article II GATT 1994, since those duties were “in excess of those set forth and provided for in the Schedule of Concessions of the United States”; and c) the same US announcement of 10 May of the “black list” violated Article 23 DSU, “which seeks ‘strengthening the multilateral system’ by specifically prohibiting recourse to unilateral actions” (204).

It is evident how advanced and interesting were the economic and legal aspects of the dispute on the automotive sector, and how important was for both sides to arrive at a mutually agreed solution as soon as possible. The Japanese automakers risked immediate and remarkable losses as a consequence of US retaliation; the United States needed to devise a way to improve access to the Japanese market, which was vital for the US car industry, a very important part of the American economy, without damaging too much the US Japanese cars dealers. To these substantial problems, the US had to add the clever and astute formal WTO Japanese challenge of the consistency of the US Section 301 mechanism with the WTO system — a very delicate question within the US Congress, which had accepted the Uruguay Round Results on the condition that the use of American trade laws would have been maintained (205) — a challenge whose positive results, if pursued until the contentious stage of the DSU, was foreseen by most of the major trade experts (206).

(204) On the scope of this provision and on how it affects US Section 301, see C. SCHEDE, *The Strengthening of the Multilateral System-Article 23 of the WTO Dispute Settlement Understanding: Dismantling Unilateral Retaliation under Section 301 of the 1974 Trade Act?*, in *World Competition*, 1996, Vol. 20, pp. 109-138.

(205) On this point, see the paragraph devoted to “[t]he United States’ Domestic Position” on Section 301 by T.M. ABELS, *The World Trade Organization’s First Test: The United States-Japan Auto Dispute*, in *UCLA Law Review*, 1996, pp. 467-526, at pp. 493-497.

(206) The Government of Japan, in its *Communication* to the WTO (see footnote 208) reported a passage from the *The Wall Street Journal* of 11 May 1995, stating that according to Professor John Jackson “the Japanese ha[d] a ‘cold, flat-out easy case’ against the US. ‘If the US fe[lt] it ha[d] been aggrieved, it ha[d] an obligation to go to the WTO first before applying sanctions’”. Also according to Alan F. Holmer, former Deputy US Trade Representative, “Japan ha[d] a darn good

The consequence of these very particular circumstances was the great accuracy devoted by the disputants, especially by Japan ⁽²⁰⁷⁾, at the DSU consultations. On 17 May 1995 Japan, along with its request for consultations, issued and circulated to all WTO Members a detailed Communication in which it explained in detail why the US unilateral measures infringed the above mentioned WTO provisions, and why, in light of the magnitude of the US retaliation, it was necessary to consider the matter as a case of urgency under Article 4:8 DSU ⁽²⁰⁸⁾. In particular, Japan stressed its perplexities on the consistency of the US retaliatory measures with the constant statements made by the American Government on the use of Section 301, according to which unilateral measures could be adopted independently of the previous exhaustion of the DSU procedures only when they concerned matters not covered by the WTO Agreements ⁽²⁰⁹⁾. Japan said that it did not see any difference between the Japanese measures and practices against which the US had decided to react unilaterally outside the WTO framework (they concerned only the auto parts market) and those also addressed by the USTR in its “pre-filing” notification letter. Then, by using the US arguments in the pre-filing notification, Japan indicated the WTO legal basis which should have been used by the US to file a DSU complaint, instead of initiating a Section 301 action.

The US “pre-filing” notification defined the Japanese regulations

case in the WTO.” This statement is reported by W.E. SCANLAN, *A Test Case for the New World Trade Organization's Dispute Settlement Understanding: The Japan-United States Auto Parts Dispute*, in *Kansas Law Review*, 1996, pp. 591-618, at p. 609, ft. 181, when affirming that the view that Japan had “a very strong case against the US” was widely shared among the experts.

(207) The accuracy devoted by Japan to the consultations does not have to come as a surprise. In fact, Japan, during the Uruguay Round, had constantly promoted the strengthening of bilateral consultations before referring the case to a panel. See T.P. STEWART, (ed.) *The GATT Uruguay Round, A Negotiating History (1986-1992)*, cit., at pp. 2727 ff.

(208) Communication from Japan of 17 May 1995, *Background Paper on Government of Japan Request for Consultations Pursuant to WTO Procedures*, WT/INF/2.

(209) See SCANLAN, W. E., *A Test Case for the New World Trade Organization's Dispute Settlement Understanding: The Japan-United States Auto Parts Dispute*, cit., at p. 606.

on the "auto parts aftermarket" as "excessive and complex", resulting in "market discrimination", and going "far beyond what is necessary to protect [safety and the environment], and ... applied *with the effect of creating unnecessary obstacles to international trade*" ⁽²¹⁰⁾. These US allegations, in Japan's opinion, could fall all under the principle of national treatment contemplated by Article III GATT 1994, and under Articles 2.2 TBT, according to which "technical regulations shall not be more trade restrictive than necessary" and 5.2 TBT (whose wording in fact was restated by the US for expressing its claim) which contemplates that "conformity assessment procedures are not prepared, adopted or applied with a view to or *with the effect of creating unnecessary obstacles to international trade*" ⁽²¹¹⁾. Japan also considered the official "warning" made by the US to file a case before the WTO inappropriate, since the US seemed "to be using its WTO complaint more as a political tool than as a genuine effort to resolve the dispute in good faith."

Subsequently, at the DSB meeting of 31 May 1995, the Government of Japan further clarified the legal basis of its request for consultations, and circulated its statement to WTO Members ⁽²¹²⁾. Among others, it qualified the US withholding of liquidation begun on 20 May as a *de facto* restriction on trade, infringing Articles XI and XIII GATT 1994. It gave better reasoning for qualifying the dispute as a "case of urgency", underlining the irreversibility of the damage that dealers handling Japanese luxury cars would suffer if the 100% duty was implemented on 28 June: they would be "forced to fire employees and to face bankruptcy." Furthermore, Japan stressed the considerable prejudices already suffered by the Japanese Automobiles companies, which had to decide suddenly and quickly on alternative destinations for cars already shipped and on stopping the shipments of cars already prepared in Japanese harbours ⁽²¹³⁾.

(210) Emphasis added.

(211) Emphasis added.

(212) *United States' Auto and Autoparts Issues: US Unilateral Measures, Statement by Japan* of 31 May 1995, WT/DSB/COM/1.

(213) Of course, these were the direct effects of the withholding of tariff liquidation started by the US on 20 May, just four days after its announcement on

Always in that Statement, Japan complained of the lack of both legal reasoning and of transparency of the US decision fixing the financial amount of the retaliatory measure.

In the same DSB Meeting, the US made a statement that it subsequently requested to be circulated to WTO Members, but the only topic it dealt with was the qualification of the dispute as a "case of urgency" suggested by Japan. The US opposed this because the claims introduced concerned vital features of the entire WTO system which deserved accurate analysis by the parties as well as by the panel and the Appellate Body eventually involved in the procedure⁽²¹⁴⁾; besides, the "invocation of the urgency provisions would drastically shorten the time for consultations", and therefore would "certainly diminish the likelihood that the parties will reach a mutually agreed solution prior to the issuance of a report", thus contradicting the frequent remarks of WTO delegations that "the DSU clearly indicates that mutually agreed solutions are to be preferred."

The DSU consultations between the US and Japan were held on 12 June 1995. On that occasion, the Asian Government presented two documents which were promptly circulated to all WTO Members. In the first one, after having expressly stated that "the purpose of th[at] paper [was] to further clarify the legal basis" of its request for consultations⁽²¹⁵⁾, Japan presented its conditions to be accepted

16 May 1995. The shipments of cars from Japan to the US takes an average of about two weeks: thus, the four days notice was evidently not sufficient for the development of a market strategy which would limit the damages caused by the US' withholding of tariff liquidation. See the *Statement by Japan* of 31 May 1995, cit., para. E, II.

(214) It must be recalled that in case of urgency the DSU provides for tighter time frames also for the panel and the Appellate Body. Article 12:8 DSU establishes that "the panel shall aim to issue its report to the parties to the dispute within three months" from the date that the composition and terms of reference of the panel have been agreed upon; Article 17:5 requires that the Appellate Body, when fixing its timetable, "shall take into account ... if relevant" Article 4:9, according to which "[i]n cases of urgency ... the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible."

(215) *United States-Imposition of Import Duties on Automobiles From Japan Under Sections 301 and 304 of the Trade Act of 1974*, Communication by Japan of 13 June 1995, *Consultations Pursuant to Article XXII:1 of GATT 1994* and

by the United States to settle amicably the dispute with Japan: the American Government had to withdraw the announcements of unilateral measures and of the list of 10 and 16 May, and had to terminate "immediately" the withholding of liquidation ⁽²¹⁶⁾.

The second paper presented by Japan to the delegation of the United States during the same meeting is particularly interesting: it was a detailed and quite long list of questions on legal and factual aspects of the US measures and practices object of the DSU procedure ⁽²¹⁷⁾. Among others, Japan asked whether the US intended to justify its unilateral measures on the basis of any of the authorized exceptions to the various WTO provisions allegedly infringed according to the complainant's opinion; then, it asked the US to explain where it drew the line between WTO and non-WTO covered acts, policies and practices, and to specify, with reference to the auto parts market, the exact scope of the US "pre-filing" notification and of the Section 301 retaliation. Through its serious work undertaken during consultations and through its detailed questionnaire Japan legitimately forced the US to communicate during their meeting held under the DSU every possible justification for its conduct based on the numerous derogations characterizing WTO rules, so as to evaluate in light of all the appropriate information whether and how to amicably settle the case, or to continue with the DSU procedures.

On 28 June 1995, just few hours before the imposition of the 100% duty on Japanese luxury cars, the disputants announced that an agreement had been reached ⁽²¹⁸⁾. Thus, the new DSU mechanism was successful in providing the optimal context for the deter-

Article 4 of the DSU Concerning United States Imposition of Import Duties on Automobiles From Japan Under Sections 301 and 304 of the Trade Act 1974, WT/DS6/5, at p. 2, point A. (2).

(216) WT/DS6/5, at p. 2, point A. (3).

(217) *United States-Imposition of Import Duties on Automobiles From Japan Under Sections 301 and 304 of the Trade Act of 1974*, Communication from Japan of 13 June 1995, *Japan's Questions to the United States for the Consultations Pursuant to Article XXII:1 of GATT 1994 and Article 4 of DSU*, WT/DS6/6.

(218) See the USIA Press Release by Jon Schaffer of 28 June 1995 *US, Japan Settle Auto Dispute, Avert Trade War*, in gopher://198.80.36.82.7...ge/archives/1995/pdq.95, file id. 95062803.ECO. The text of the *US-Japan Automotive Agreement and Supporting Documents*, signed in Washington on 23 August 1995, is

mination of an amicable solution which had seemed impossible to achieve after 20 months of negotiations held outside the WTO within the 1993 bilateral Framework.

The Agreement, which was finalized on 16 August (219) and signed on 23 August 1995, is a complex document formed by the exchange of letters between Ambassador of Japan Takakazu Kuriyama on one side, and the US Ambassador Mickey Kantor and the US Secretary of Commerce Ronald Brown on the other side, to which are annexed different acts adopted by the two Governments and various statements mainly made by the Japanese Associations representing all the categories of economic operators involved in the automotive sector. The Automotive Agreement answers all three targets addressed by the US, i.e. the improvement of the sales of foreign cars in Japan through a more open system of dealership, of the purchases of foreign parts by Japanese firms, and the deregulation of the Japanese aftermarket for replacement parts. Regarding the first two points, it establishes no precise numerical targets to be achieved through its implementation for the increases in the number of Japanese dealers selling US motor vehicles or in the quantity of US goods to be purchased, as was requested by the US (220) and strongly opposed by Japan (221): instead, the Agreement has estab-

published in *ILM*, 1995, pp. 1489 ff. with an introductory note by James T. Southwick at pp. 1482 ff.

(219) See the Press Release of 16 August 1995 *US and Japan Finalize Text of Auto and Auto Parts Agreement*", in gopher://198.80.36.82.7...ge/archives/1995/pdq.95, file id. 95081604.EEA.

(220) See the fact sheet distributed by the US Department of Commerce on 31 March 1995, reproduced in *Fact Sheet on the US-Japan Framework Talks/Autos, Auto Parts*" of 31 March 1995, in gopher://198.80.36.82.7...ge/archives/1995/pdq.95, file id. EPF505.

(221) Japan had always refused to agree on numerical targets to be achieved in the fulfilment of the agreement, and qualified the undertaking of purchasing fixed quantities of US products as a private decision that had to be accepted by the Japanese operators -who constantly refused to stipulate any kind of voluntary plan- and that was opposed by other foreign countries fearing that the obligation to purchase US goods would damage their products (see WT/INF/2 and WT/DSB/COM/1). The representative of Japan, when presenting the Agreement reached with the US before the WTO Council for Trade in Goods, emphasized this success of its Government: "[t]he biggest obstacle in the negotiations, the issue of numerical targets such as the renewal and expansion of the parts purchase plans had not

lished obligations of financial measures in favour of foreign imports, of best endeavours to promote foreign products, and of information, mainly to be fulfilled by Japan. With reference to this last obligation, the Asian Government accepted to send a letter to its economic operators informing them that they are free to deal with foreign products, and that they may denounce — as any other, also foreign, operator — to the Japan Fair Trade Commission those practices which appear to be in violation of the Japanese Anti-Monopoly Act. Also the statements made by the Japanese industrial association contain no hint of voluntary purchasing plans: adopting the same technique as the Asian Government, they have only announced plans to improve the presence of US goods for Japanese consumers and operators, without indicating any concrete results to be expected.

The obligations regarding Japanese regulation of the aftermarket for replacement parts are more concrete, also because it concerns governmental measures, and so the collaboration of private enterprises is not necessary to adopt different rules. The agreement provides for the general principles that are to guide Japan in its deregulation activity, and then specifically addresses how some technical aspects are to be changed, and the duties of information and transparency which the Japanese Minister of Transport is to fulfil to answer to general enquiries, complaints and to give prompt notice to interested operators of all the modifications introduced.

The Automotive Agreement has also provided for the collection of data and for 17 common criteria on the basis of which the results of its implementation may be assessed. It established annual consultations between the US and Japan until the end of 2000, when it will be decided whether it is necessary to continue them. On 6

been included in the outcome, thus confirming the position of Japan that this issue was outside the scope and responsibility of the government" (see *Council for Trade in Goods, Minutes of Meeting* of 3 July 1995, G/C/M/4, part 7). The voluntary purchasing plans sought by the United States are defined as Voluntary Import Expansions (VIEs) by J. BHAGWATI, *The US-Japan Car Dispute: A Monumental Mistake*", in *International Affairs*, 1996, pp. 261-279, who strongly criticizes the US trade policy chosen for the automotive dispute.

September 1995 ⁽²²²⁾, the Office of the USTR and the US Department of Commerce have set up a ten-member "Interagency Enforcement Team Regarding the US-Japan Agreement on Autos and Autos Parts" with the duty to issue a report to the President of the United States evaluating progress under the Agreement in light of the 17 agreed criteria every six months ⁽²²³⁾.

8. *Improvement in frequency and depth of bilateral analysis of trade matters produced by the DSU.*

Faced with the precision requested during the consultations' phase it is not surprising to ascertain from an analysis of the WTO Members' conduct that it is very common for them to resort to bilateral talks held outside the WTO before filing a case under the DSU rules, so as to lead *adequate* WTO consultations, i.e. presenting facts and claims in such a way that any of the parties, be it the complainant or the respondent, will be allowed to decide under the best conditions between an agreed solution or the continuation of the dispute before third party bodies.

In the most important bilateral joint declarations undertaken by

(222) See the *Executive Summary of the Report to President William Jefferson Clinton of the Interagency Enforcement Team Regarding the US-Japan Agreement on Auto and Auto Parts* of 12 April 1996.

(223) The Interagency enforcement team had issued four reports as of June 1998: on 12 April 1996 (already mentioned in the previous footnote), on 21 October 1996, on 18 April 1997 and on 4 December 1997. The comments by the USTR on the last Interagency Enforcement Team were not positive with regard to some aspects of some area covered by the Automotive Agreement: see *US Trade Representative Charlene Barshefsky Expresses Concern Over Pace of Progress Under US-Japan Automotive Agreement*, USTR Press Release of 4 December 1997 no. 97-101. Commenting on the same data evaluated by the Interagency enforcement team William C. Duncan, General Director of the Japan Automobile Manufacturers Association (JAMA) arrived at different conclusions: see *Administration's Pessimistic Conclusions on Japan Auto Agreement Are Based on Insufficient Analysis-JAMA Newsletter Reports Today*, of 13 November 1995, in <http://www.japanauto.com/library/press/pr-1997/pr-111397.htm>, and *Statement of William C. Duncan, General Director, Japan Automobile Manufacturers Association, USA, Reaction to Administration Report Monitoring US-Japan Automotive Framework Agreement*, of 4 December 1997, in <http://www.japanauto.com/library/press/pr-1997/pr-120497.htm>.

the European Union after the entry into force of the WTO there has always been a part devoted to the improvement of trade relations. In "The New Transatlantic Agenda", signed by the European Union and the United States on 3 December 1995 ⁽²²⁴⁾ the two trading partners have committed, in the framework of the creation of a "New Transatlantic Market Place", to "carry out a joint study on ways of facilitating trade in goods and services and further reducing or eliminating tariff and non-tariff barriers" ⁽²²⁵⁾, and to reinforce "[a]s part of a confidence-building process ... [their] efforts to resolve bilateral trade issues and disputes" ⁽²²⁶⁾. In the Action Plan agreed between the EU and Canada the two parties have given "priority to resolving pending bilateral trade disputes and to enhancing the development of bilateral trade flows" and have committed themselves "to a more effective use of, and where necessary improve, existing mechanisms, including those under the 1976 Framework Agreement for Commercial and Economic Co-operation ⁽²²⁷⁾, to provide early warning of potential trade and investment disputes and to address the increase of trading and business opportunities" ⁽²²⁸⁾. Analogous commitments have been undertaken by the European Union and Australia in their "Joint Declaration on Relations Between the European Union and Australia", signed on 26 June 1997, where they declare their intention to strengthen their economic cooperation through the following actions: by devoting attention to all trade areas so as to identify and eliminate barriers; by improving cooperation between the interested branches of the ad-

(224) See the full text in the Press Release of the Council of the European Union No. 12296/95 (Presse 356) of 18 December 1995.

(225) See *The New Transatlantic Agenda*, Part III, *Contributing to the Expansion of World Trade and Closer Economic Relations*, cit., at p. 9.

(226) See the *Joint EU-US Action Plan*, Part III, *Contributing to the Expansion of World Trade and Closer Economic Relations*, Paragraph 2. The New Transatlantic Marketplace, lett. b), *Confidence building*, annexed to *The New Transatlantic Agenda*, cit., at p. 33.

(227) This Agreement is published in OJEC L260/1 of 24 September 1976.

(228) *Joint Canada-EU Action Plan* of 17 December 1996, part I. Economic and Trade Relations, no. 2 a), in <http://europa.eu.int/en/comm/dg01/public41.htm>. See also the *Joint Political Declaration on EU-Canada Relations*, signed in Ottawa, Canada, on 17 December 1996, in <http://europa.eu.int/en/comm/dg01/public40.htm>

ministrations, to be based also on constant information of the new aspects of their trade policies; and, finally, by potentiating the already existing consultative bilateral mechanisms, that have to “continue to play an active role in this respect through regular exchanges and meetings” (229).

With regard to Japan, in the framework of the EC/Japan Joint Declaration of 1991 (230), the EC Commission and the Asian Government have recently agreed “that trade disputes should firstly be addressed through bilateral discussion, but that resort to the WTO dispute settlement mechanism is a natural step if bilateral solutions cannot be found” (231). Pre-WTO consultations have already recorded a success in the dispute raised by the EC against the Japanese fisheries import quota restrictions: “[w]ith the prospect of action within the World Trade Organization looming” (232), Japan decided to improve its fisheries import quota system after meetings held with the EC Commission outside the WTO framework (233).

9. *The DSU ability to devise diplomatic solutions for cases longly debated (and to no avail) outside its framework.*

The fact that during previous non-WTO consultations parties do not find a solution to a dispute does not at all automatically entail that improvement will be impossible to achieve during the subsequent DSU consultations prior to the establishment of a panel. Besides the above illustrated US/Japan automotive dispute, there are

(229) See the *Joint Declaration on Relations Between the European Union and Australia* of 26 June 1997, in EC Press Release PRES/97/213 of 2 July 1997, Part 3, *Dialogue and cooperation*, Section devoted to *Trade and economic cooperation*.

(230) *Joint Declaration on Relations between the European Community and its Member States and Japan* of 18 July 1991, issued at The Hague, in <http://europa.eu.int/en/comm/dg01/pol33.htm>.

(231) See *Investment, Deregulation and Trade Covered by High-Level EU-Japan Talks*, EC Press Release IP/97/342 of 23 April 1997.

(232) See the EC Commission paper *Introduction to EU-Japan Relations*, in <http://europa.eu.int/en/comm/dg01/eu-jap.htm>, Part III *EU-Japan economic and trade relations*”, at p. 8.

(233) *Japan's Import Restrictions on Fish to be relaxed*, EC Press Release IP/97/638 of 11 July 1997.

many other examples of cases that have been settled directly by the disputants once the case had been filed under the DSU, despite failure of bilateral talks outside the WTO.

In some cases amicably settled within the DSU system, the previous non-WTO consultations were directly mentioned in the requests for consultations. It was so for the first case raised under the DSU rules, regarding the *Malaysian prohibition of imports of polyethylene and polypropylene* (234). Singapore, in its request for consultations with Malaysia, besides presenting the legal basis of its complaint (235), reported that from 1991 it had expressed to Malaysia "its deep concern" towards the restrictive trade policy pursued with regard to imports of plastic resins, in whose exports Singaporean producers were greatly interested. The Complainant noted that "these approaches have not resulted in a removal of the ... trade restrictions". On the contrary, the Malaysian Government had formalised its restrictive trade policy by enacting measures prohibiting imports. Singapore expressly recalled that it had made recourse to the DSU as a consequence of the failure of the attempts made outside the WTO framework. One week after the legally well reasoned request for the establishment of a panel by Singapore (236), Malaysia changed the contested measures (237). Further bilateral talks were then held between the two countries and diligently reported during the following DSB meetings, where Singapore deferred its request for the establishment of a panel (238). At the end

(234) *Malaysia-Prohibition of Imports of Polyethylene and Polypropylene*, Request for consultations by Singapore of 10 January 1995, WT/DS1/1.

(235) It deemed that the import prohibitions of those types of plastic resins infringed Articles X and XI GATT 1994, Article 3 of the WTO Agreement on Import Licensing Procedures and the notification requirements established by paragraph 3 of the 1979 *Understanding*, as well as paragraph 1 of the WTO Decision on Notification Procedures.

(236) *Malaysia-Prohibition of Imports of Polyethylene and Polypropylene*, Request by Singapore for Establishment of Panel of 16 March 1995, WT/DS1/2.

(237) *Malaysia-Prohibition of Imports of Polyethylene and Polypropylene*, Communication from Malaysia of 29 March 1995, WT/DS1/3.

(238) The records of the DSB meetings concerning the *Malaysia-Prohibition of Imports of Polyethylene and Polypropylene* case are very interesting since they report the entire negotiating process followed by the two countries so as to arrive to an amicable settlement: see *DSB Minutes of Meeting* of 10 February 1995,

of a careful examination of all the details of the new administrative system, provided by Malaysia during the subsequent meetings, the Complainant deemed the revised automatic licensing scheme fully consistent with WTO, and then formally withdrew its panel request at the DSB meeting of 19 July 1995 ⁽²³⁹⁾.

In the *Poland - Import Regime for Automobiles* case ⁽²⁴⁰⁾, India complained that the tariff system and the duty free quota concerning motor cars, introduced by Poland in order to fulfil the obligations arising from the Interim Agreement on Trade Related Matters concluded with the EC ⁽²⁴¹⁾, was GATT inconsistent, and reported that it had already introduced an unsuccessful complaint under GATT 1947. In August 1996, India and Poland notified the WTO of the conditions of the mutually agreed solution that they had reached following DSU consultations ⁽²⁴²⁾, according to which Poland was to establish an import quota — subject to an *ad valorem* customs duty rate of 25 per cent or of US \$ 800 (expressed in ECU), whichever is higher — for cars manufactured in countries which fell into the GSP preferences in the Polish market and respecting its environmental automotive technical standards.

Another reference to bilateral talks previous to DSU consultations is found in the request introduced by the EC with regard to the *Japanese Measures Affecting the Purchase of Telecommunications Equipment* ⁽²⁴³⁾. According to the EC, by concluding with the US

WT/DSB/M/1, part 5, *DSB Minutes of Meeting* of 29 March 1995, WT/DSB/M/2, part 3, *DSB Minutes of Meeting* of 10 April 1995, WT/DSB/M/3, part 2, and *DSB Minutes of Meeting* of 19 July 1995, WT/DSB/M/6, part 6. An important remark on a procedural point was raised by the US representative during the discussions of the present case, when he emphasized that the request for a panel made by Singapore on 16 March concerned a measure that few days after had been modified by Malaysia, with regard to which not even consultations had yet been held. See *DSB Minutes of Meeting* of 29 March 1995, WT/DSB/M/2, part 3.

(239) See the *DSB Minutes of Meeting* of 19 July 1995, WT/DSB/M/6, part 6.

(240) *Poland-Import Regime for Automobiles*. Request for Consultations by India of 28 September 1995, WT/DS19/1.

(241) See the text in OJEC L114/1 of 30 April 1992.

(242) *Poland-Import Regime for Automobiles*, Notification of Mutually Agreed Solution of 26 August 1996, WT/DS19/2.

(243) *Japan-Measures Affecting the Purchase of Telecommunications*

the "IDO-Monitoring Agreement" of 12 March 1994 concerning access to the Japanese telecommunication market the Japanese Government infringed, among others, the principle of the most favoured nation enshrined in Article I GATT 1994, as well as Article XVII GATT 1994 ⁽²⁴⁴⁾. In fact, in that Agreement, Japan had undertaken the commitment "to take all available measures to ensure that IDO fulfils its commitment" under the Letter of Intent signed by IDO ⁽²⁴⁵⁾ and the US company Motorola, according to which IDO was to increase investment and advertising for an infrastructure requiring the network equipment provided by Motorola, and to buy the agreed quota of Motorola products. After just two months, the case was settled. In the settlement agreement, Japan committed itself to respect the principle of non-intervention on the commercial decisions of Japanese telecommunications operators, and thus allow them to purchase on a purely commercial basis; it also agreed to set up together with the EC a monitoring mechanism so as to evaluate, on the basis of the agreed criteria, the results of the implementation of the settlement ⁽²⁴⁶⁾.

Information reported in press releases and acts issued by the United States and by the EC Commission indicates three other cases successfully concluded under the DSU after the failure of bilateral meetings held before starting WTO procedures.

Equipment, Request for Consultations by the European Communities of 18 August 1995, WT/DS15/1.

(244) This provision requires that contracting parties allow free economic operators established in their territory to make any choice regarding their enterprises "solely in accordance with commercial considerations."

(245) "IDO" indicates the Nippon Idou Tsushin Corporation.

(246) We may refer of the content of this agreement thanks to a conversation with an EC Official from the EC Commission. The EC official qualified the settlement as a "political understanding." We are then in the conditions to state that the case was settled bilaterally (see also *The European Union-A Major Client of the WTO*, EC MEMO/96/115 of 5 december 1995, which at point 15 of p. 3 reports that the dispute raised by the EC against the Japanese telecommunications purchase system was settled bilaterally) thus eliminating the doubt still emerging from the wording used in the *Overview of the State-of-play of WTO Disputes* dated 24 June 1998 (at section 8 B, *Settled or Inactive Cases*, no. 4, this WTO document still states that "[a]lthough there has been no official notification, the case appears to have been settled bilaterally.")

In the case brought by the US against Korea, it was questioned the Korea's discipline concerning the determination of the shelf-life of products, i.e. the definition of "the period between the date of manufacture of the product and the date by which a product must be sold at the retail level" ⁽²⁴⁷⁾, also indicated as the "use-by" or "sell-by" dates. While most countries rely on the manufacturers' determination of shelf-life of products, Korea had adopted a system of government mandated shelf-life standards. Subsequently to a sudden seizure by the Korean authorities of a shipment of US sausages in February 1994, due to their lack of conformity to the 30-day expiration period established for that product by Korean measures, and to a Section 301 petition filed on November 1994 by the US meat industry ⁽²⁴⁸⁾, the USTR started its investigation, which came to the conclusion that "Korean shelf-life standards [were] not supported by scientific studies, and [were] applied in an arbitrary and discriminatory manner" ⁽²⁴⁹⁾. Short after the final breakdown of bilateral consultations at the end of April 1995, the United States filed the case before the WTO ⁽²⁵⁰⁾; just a few months thereafter, the two disputants announced the settlement of the controversy ⁽²⁵¹⁾, which focused on interim governmental measures extending the "use-by" dates so as to allow an immediate improvement in US/Korea trade relations, and on the phasing-out of the Korean system, to be definitively substituted by 1 July 1996 with the principle of manufacturer-determined shelf-life of products. The agreement also

(247) This is the definition on which the US and Korea subsequently agreed on in the mutually agreed solution notified to the DSU. See *infra* document WT/DS5/5.

(248) See the petition *Korean Agricultural Market Access Restriction*, Section 301-95, filed on 18 November 1994 by the National Pork Producers Counsel, the American Meat Institute and the National Cattlement.

(249) See the Background note added to the Statement by Ambassador Kantor on the settlement of the dispute before the WTO in *Statement by Ambassador Kantor*, USTR Press Release No. 95-53 of 20 July 1995.

(250) *Korea-Measures Concerning the Shelf-Life of Products*, Request for consultations by the United States of 3 May 1995, WT/DS5/1.

(251) *Korea-Measures Concerning the Shelf-Life of Products*, Notification of Mutually Agreed Solution of 20 July 1995, WT/DS5/5. Ambassador Kantor stated that "our two governments have demonstrated that, using the tools of the WTO, we can achieve a mutually acceptable result." See the USTR Press Release 95-53.

included some specific measures aimed at guaranteeing a WTO-consistent access of US meat products to the Korean market ⁽²⁵²⁾. Of course, given the gradual modification of the Korean shelf-life system, the agreement established a duty for Korea to notify of the removals, already realized or to be realized, of the “use-by” date requirements, and to identify the products affected by the modifications through the Harmonized System Classification of the 1983 Brussels Convention ⁽²⁵³⁾.

In the case regarding the *US Textiles Rules*, the EC presented its request for consultations only after the failure of bilateral talks held with the American Government pursuant to a request by Feder-tessile ⁽²⁵⁴⁾ under the New EC Trade Barriers Regulation, which establishes the procedures to be followed by private parties to ask the EC Commission to investigate whether a third-country measure or practice of a third country infringes the international commitments — particularly WTO law — undertaken by that country towards the EC ⁽²⁵⁵⁾. In the subsequent February 1997 decision expressing the intention to open a procedure before the WTO, the EC Commission reported to have had numerous consultations with the US on the consistency of the new US textiles rules of origin with WTO law well before the opening, on November 1996, of the

(252) See WT/DS5/5, Annex II, p. 5.

(253) See WT/DS5/5, Annex I, part II, paragraph 2, *References to Harmonized System Headings and Subheadings*. See the communications by Korea WT/DS5/5/Add.1 of 12 October 1995, WT/DS5/5/5/Add.1/Rev.1 of 26 January 1996, WT/DS5/5/5/Add.2 of 26 January 1996, WT/DS5/5/5/Add.3 of 26 January 1996, WT/DS5/5/5/Add.4 of 1 July 1996, and WT/DS5/5/5/Add.5 of 9 August 1996. For the text of the HS Convention see *OJEC* L198/3 of 20 July 1987.

(254) See the Notice of initiation of an examination procedure concerning an obstacle to trade, within the meaning of Council Regulation (EC) No. 3286/94, consisting of changes made by the United States of America (USA) in their rules of origin for textile and apparel products No. 96/C 351/03, in *OJEC* C351/6 of 22 November 1996.

(255) EC Council Regulation No. 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, in *OJEC* L349/71 of 31 December 1994. On this regulation see *infra*, para. 15 lett. b).

3286/94 investigation requested by Federtessile, and to have continued intensive bilateral meetings with US representatives on that topic, even if their outcomes were dissatisfying for the EC ⁽²⁵⁶⁾. In May 1997, the EU requested consultations under the DSU ⁽²⁵⁷⁾, and the resolution of the case was announced on August 1997 ⁽²⁵⁸⁾. Its text — having the form of an exchange of letters between the USTR Representative Charlene Barshefsky and Sir Leon Brittan, Vice-President of the European Commission, to which is annexed a *procès-verbal*, always agreed on by the US administration and EC Commission — was notified on February 1998 ⁽²⁵⁹⁾. The agreement consists of two types of commitments undertaken by the US administration: *a*) to enact provisional measures allowing textiles and apparel products processed in an EC Member Country to be marketed as made in that State, in order to avoid a restriction of trade by comparison with EC exports prior to the implementation of the contested US rules of origin; and *b*) to introduce to the US Congress a proposal for the final legislation by August 1998, after the conclusion of the negotiations on the harmonization of rules of origin currently underway under the auspices of the World Customs Organization (WCO). These WCO negotiations are expected to terminate by 20 July 1998: thus, the US intent is that of definitively introducing the rules of origin of interest to the EC into the US framework legislation implementing the new WCO agreement ⁽²⁶⁰⁾.

(256) EC Commission decision of 18 February 1997 on the initiation of international consultation and dispute settlement procedures concerning changes to United States rules of origin for textiles products resulting in the non-conferral of Community origin on certain products processed in the European Communities No. 97/162/CE, in *OJEC* L62/43 of 4 March 1997, part E, *Conclusions and Measures to be adopted*, pt. 12. See also *EU Threatens WTO Action on US Textiles Rules*, EC Press Release IP/97/194 of 7 March 1997.

(257) *United States-Measures Affecting Textiles and Apparel Products*, Request for Consultations by the European Communities of 22 May 1997, WT/DS85/1.

(258) See *EU Action Prompts US to Change Textiles Rules*, EC Press Release IP/97/744 of 7 August 1997.

(259) *United States-Measures Affecting Textiles and Apparel Products*, Notification of Mutually Agreed Solution of 25 February 1998, WT/DS85/9.

(260) We thank Natalie Chaze, EC Commission officer, Piero Costa, General Secretary of Federtessile, and Andrew Stoler, USTR Deputy Chief of Geneva

The case *Korean Laws, Regulations and Practices in the Telecommunications Procurement Sector* is of particular interest since the recourse to DSU procedures allowed the conclusion of negotiations formally begun between the EC Commission and Korea on May 1995, after the EC Commission had asked for and obtained from the EU Council, on 28 November 1994, a negotiating directive, as provided by Articles 113:3 and 228:1 ECT ⁽²⁶¹⁾. After a year of talks, the EC Commission, dissatisfied with the Korea's offers, decided to file a case against that country ⁽²⁶²⁾. It alleged that the Korean system infringed GATT 1994, being protectionist and discriminatory since it did not permit the purchase of foreign telecommunications equipment if one of Korean origin was available and, furthermore, that in 1993 Korea had concluded with the US an Agreement establishing an exception to this regime only for US products. By the end of that year, a global agreement for the mutual opening of the telecommunication procurement market had been eventually achieved ⁽²⁶³⁾. When concluding the negotiations, the EC Commission undertook to suspend its WTO action and to formally end the WTO dispute procedure before the signature of the bilateral agreement ⁽²⁶⁴⁾. The EC Commission and Korea notified the WTO of their mutually satisfactory solution just one week before Sir Leon

Mission, for having provided information on how transactions between the EC and the US took place. The author assumes full responsibility for any eventual misrepresentation of the *US Textiles Rules* case.

(261) See the *Explanatory Memorandum* presented by the EC Commission together with its proposal for a Council Decision concerning the conclusion of an Agreement on telecommunications procurement and an Agreement in the form of a memorandum concerning the procurement of private operators between the European Community and the Republic of Korea, COM(97) 56 final of 17 February 1997, at p. 3. Special thanks to Jonathan Hatwell, EC Commission officer, for the documentation supplied on the relations between the EC and Korea.

(262) *Korea-Laws, Regulations and Practices in the Telecommunications Procurement Sector*, Request for Consultations by the European Communities of 9 May 1996, WT/DS40/1. See also *Commission Takes Korea to WTO Over Telecoms*, EC Press Release IP/96/408 of 10 May 1996.

(263) *Breakthrough Opens US \$ 6 BN Korean Telecoms Market to European Business*, EC Press Release IP/96/1073 of 25 November 1996. See also the previous EC Press Release concerning the same dispute *Commission Makes Last Ditch Effort to Solve Telecom Dispute with Korea*, IP/96/942 of 21 October 1996.

(264) See the *Explanatory Memorandum*, cit., at p. 3.

Brittan signed the telecom agreement ⁽²⁶⁵⁾. However, the text of the agreement was not notified to the WTO ⁽²⁶⁶⁾, but published subsequently in the Official Journal of the European Communities ⁽²⁶⁷⁾.

10. *The solutions to the Indian import restrictions.*

A further example of the special strength of DSU consultations is given by the challenge raised to the Indian import restrictions. Subsequent to the 1995 International Monetary Fund (IMF) report on the health of India's financial situation, multilateral consultations started within the WTO Balance of Payments (BOP) Committee in order to reach a *consensus* on the elimination of Indian restrictions, set up and maintained for decades for BOP purposes, as provided for by Article XVIII GATT 1994. Three reports by the WTO BOP Committee and bilateral talks between India and interested countries were not sufficient to reconcile the opposing views on the modalities and on the time-frame of the phase-out ⁽²⁶⁸⁾. After the third failure to reach *consensus* at the consultations held on 30 June and 1 July 1997 within the WTO BOP Committee, all India's major trading partners decided to file a request for consultations

(265) See *Sir Leon Brittan Visits Korea to Press for Continued Progress in Market-Opening*, EC Press Release IP/97/917 of 27 October 1997, and the information notice on the entry into force of the EC/Korea Agreement in OJEC L321/42 of 22 November 1997.

(266) See *Korea-Laws, Regulations and Practices in the Telecommunications Procurement Sector*, Notification of a Mutually Agreed Solution of 22 October 1997, WT/DS40/2. This document says only that "[t]he European Community and the Republic of Korea hereby notify the Dispute Settlement Body that they have reached a mutually satisfactory solution", and that "[b]ased on this development, the European Communities and the Republic of Korea have agreed to terminate consultations on this matter that took place in accordance with Article XXIII:1 of the GATT 1994 and Article 4 of the DSU."

(267) See the Decision of the Council of 22 April 1997 No. 97/784/CE concerning the conclusion of an Agreement on telecommunications procurement and an Agreement in the form of a memorandum concerning the procurement of private operators between the European Community and the Republic of Korea, in OJEC L321/30 of 22 November 1997.

(268) See *EU Disappointed at outcome of talks on India's Import Restrictions*, EC Press Release IP/97/600 of 2 July 1997.

under the DSU rules ⁽²⁶⁹⁾. While the United States asked for the establishment of a panel ⁽²⁷⁰⁾, and New Zealand did not take other initiatives after the request for consultations, the other complaining WTO Members reached an amicable settlement of the dispute with India.

The texts of the mutually agreed solutions were notified to the DSB between March and May 1998 ⁽²⁷¹⁾. They provide for phasing out periods to eliminate India's import restrictions on foreign industrial, agricultural and textile products: as long as India implements what undertaken in the mutually agreed solutions, its counterparts have committed not to initiate actions under the DSU. Every solution clearly states an obligation for India to guarantee to each developed country "treatment no less favourable than that

(269) See *India-Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products*, Request for Consultations by the United States of 15 July 1997, WT/DS90/1; *India-Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products*, Request for Consultations by the Australia of 16 July 1997, WT/DS91/1; *India-Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products*, Request for Consultations by Canada of 16 July 1997, WT/DS92/1; *India-Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products*, Request for Consultations by New Zealand of 16 July 1997, WT/DS93/1; *India-Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products*, Request for Consultations by Switzerland of 18 July 1997, WT/DS94/1; *India-Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products*, Request for Consultations by the European Communities of 18 July 1997, WT/DS96/1. See also *United States Requests WTO Dispute Settlement Consultations with India Regarding India's Balance of Payments Restrictions*, USTR Press Release No. 97-68 of 15 July 1997, and *EU Requests WTO Consultations on Indian Import Restrictions*, EC Press Release IP/97/666 of 18 July 1997.

(270) *India-Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products*, Request for the Establishment of a Panel by the United States of 6 October 1997, WT/DS90/8.

(271) See *India-Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products*, Notification of Mutually Agreed Solution of 23 April 1998, WT/DS91/8; *India-Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products*, Notification of Mutually Agreed Solution of 3 April 1998, WT/DS92/8; *India-Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products*, Notification of Mutually Agreed Solution of 23 March 1998, WT/DS94/9; *India-Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products*, Notification of Mutually Agreed Solution of 6 May 1998, WT/DS96/8.

granted ... to any other country with respect to the elimination or modification of import restrictions on the products” contemplated in the annexes attached to the mutually agreed solutions “under any form, either autonomously or pursuant to agreement or understanding with that country, including pursuant to the settlement of any outstanding dispute under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes” (272). In particular, the EC/India mutually agreed solution, already announced in November 1997 (273), was concluded in the form of an exchange of letters between Mr. S. Narayanan, Indian Permanent Representative to the WTO and Mr. Roderick Abbott, holding the same position on behalf of the European Commission, and it establishes that the phasing-out of all the Indian restrictions should be realized within six years, and in three years for a substantial number of products of great export interest for the EU.

11. *Reaching a mutually agreed solution during panel proceedings: the Scallops case.*

The controversy over the trade description of scallops is another very interesting example of the DSU’s capacity to foster bilateral agreement despite the failure of previous long consultations. In this case, an agreement was reached only after the parties read the interim report issued by the panel. It was August 1993 when for the first time Canada requested consultations under Article XXII: 1 of GATT 1947 with the European Community on the trade description of scallops imposed by French authorities to market that kind of shellfish in their territory (274). According to Canada, the “effect” of the French Government Order of 22 March 1993 was to restrict the use of the trade description *noix de Saint-Jacques* or *noix de coquille*

(272) See the Agreements India/Australia, India/EC, para. 3, whose wording is almost identical. Provisions having exactly the same scope are provided for also in all the other mutually agreed solutions.

(273) *EU and India Settle WTO Dispute*, EC Press Release IP/97/988 of 14 November 1997.

(274) See WTO, Trade Policy Review, European Union, Vol. I, Geneva, 1995, p. 170.

Saint-Jacques only to a specific species of the genus *pectinidae*, excluding the Canadian scallops, that had to be described with the scientific name of the species. This measure, in Canada's opinion, interrupted, without justification, the traditional trade practice observed until the 1993 Order with regard to Canadian scallops, which could be marketed using the french expression, a tradition reflecting the fact that "the consumer does not make any distinction between *Placopecten magellanicus* ⁽²⁷⁵⁾ and other scallops which can be called 'noix de Saint-Jacques', [since] there is ... no difference between these products in terms of colours, size, texture, appearance and use" ⁽²⁷⁶⁾.

Under consultations started within Article XXII:1 of GATT 1947, Canada obtained from the European Community only a temporary solution, which was annulled by the French Government on 3 October 1994, when it issued a new Order amending the old one, stating that the term *pétoncle* (*Saint-Jacques*) could be used only until 31 December 1995.

Canada felt that the requirement to introduce the word *pétoncle* in the trade description of its scallops, even if accompanied by the traditional expression *Saint-Jacques*, "ha[d] already weakened the competitive position of the Canadian product on the French market and ha[d] decreased the volume and value of Canadian exports"; and when, at the beginning of 1996, only the word *pétoncle* would be authorized, this could only "worsen the situation" ⁽²⁷⁷⁾. So, after having made "several sincere efforts to settle the issue" ⁽²⁷⁸⁾, the Canadian Government, on 19 May 1995, decided to introduce a formal request for consultations with the EC ⁽²⁷⁹⁾, and was followed in its decision by Peru and Chile ⁽²⁸⁰⁾.

(275) This is the scientific name of the Canadian scallops.

(276) *European Communities-Trade Description of Scallops*, Request for Consultations by Canada of 19 May 1995, WT/DS7/1.

(277) WT/DS/7/1.

(278) WT/DS/7/1.

(279) *European Communities-Trade Description of Scallops*, Request for Consultations by Canada of 19 May 1995, WT/DS7/1.

(280) *European Communities-Trade Description of Scallops*, Request for Consultations by Peru of 18 July 1995, WT/DS12/1, and *European Communities-*

On 7 July 1995, after deeming the DSU consultations failed, Canada requested the establishment of a Panel ⁽²⁸¹⁾, and on September 1995 also the two Latin American countries asked for a panel ⁽²⁸²⁾. The year after, as a consequence of the interim reports issued by the WTO panels ⁽²⁸³⁾, the disputants agreed on a settlement of the case. The EC Commission signed identical agreements with each complainant. The Agreements were composed by an exchange of letters (between the — at that time — Permanent Representative of the European Commission to the WTO, Ambassador Jean-Pierre Leng, and Ambassador John Weeks, Permanent Representative of Canada to the WTO, Ambassador Carmen Luz Guarda, Permanent Representative of Chile to the WTO, and Ambassador José Urrutia, Permanent Representative of Peru to the WTO) to which it was annexed the letter from the French Permanent Delegate to the WTO to the Permanent Representative of the European Commission in Geneva, containing the new French Order

Trade Description of Scallops, Request for Consultations by Chile of 24 July 1995, WT/DS14/1.

(281) *European Communities-Trade Description of Scallops*, Request for the Establishment of a Panel by Canada of 7 July 1995, WT/DS7/7 the *Corrigendum*, WT/DS7/7/Corr. 1.

(282) *European Communities-Trade Description of Scallops*, Request for the Establishment of a Panel by Peru of 14 September 1995, WT/DS12/6 and *European Communities-Trade Description of Scallops*, Request by Chile for the Establishment of 25 September 1995, WT/DS14/6.

(283) The DSB established two panels, one on the request made by Canada and the other on the requests made by Peru and Chile. These last two countries asked, on the basis of Article 9:3 DSU, that the same panelists serving in the EC/Canada dispute also be appointed to examine their controversy, a request accepted by EC and Canada and by the same panelists. See *European Communities-Trade Description of Scallops, Constitution of the Panel Established at the Requests of Peru and Chile*, Note by the Secretariat of 26 October 1995, WT/DS12/8, WT/DS14/7. After the notification of the mutually agreed solutions, the Panel issued its — identical — reports pursuant to Article 12:7 DSU, which requires that “where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.” See *European Communities-Trade Description of Scallops* (Request by Canada), Report of the Panel of 5 August 1996, WT/DS7/R and *European Communities-Trade Description of Scallops* (Request by Peru and Chile), Report of the Panel of 5 August 1996, WT/DS12/R and WT/DS14/R.

modified according to the indications of the complainants and the authentic interpretation made by the French authorities ⁽²⁸⁴⁾. In a few words, the content of the agreement consists in marketing scallops with the same name of *Saint Jacques* or *noix de coquilles Saint Jacques* and with a clear indication of their country of origin.

12. *The duty to notify of mutually agreed solutions and the policy of transparency concerning WTO matters.*

As it is well known, the DSU requires “[a]ll solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards” to “be consistent with those agreements and” not to “nullify or impair benefits accruing to any Member under those agreements nor impede the attainment of any objective of those agreements ⁽²⁸⁵⁾. The Understanding then entrusts the WTO Members with monitoring the full respect of those requirements by means of a system of notification or circulation of “all solutions” and a right to raise any point on them before the WTO bodies.

In particular, as far as regards the direct settlements resolving trade disputes, Article 3:6 establishes that “[m]utually agreed solu-

(284) *European Communities-Trade Description of Scallops*, Notification of Mutually Agreed Solution of 5 July 1996, WT7DS7/12 (EC/Canada Agreement) and *European Communities - Trade Description of Scallops*, Notification of Mutually Agreed Solution of 5 July 1996, WT/DS12/12, WT/DS14/11 (EC/Peru and EC/Chile Agreements).

(285) On the limits characterizing the diplomatic solutions of controversies arisen between two Members of a multilateral treaty see N. BLOKKER, S. MULLER, *Towards More Effective Supervision by International Organizations: Some Concluding Observations*, in N. BLOKKER, S. MULLER, (eds.), *Towards More Effective Supervision by International Organizations - Essays in Honour of Henry G. Schermers*, Martinus Nijhoff Publishers, Dordrecht, 1994, Vol. I pp. 275-311, at p. 285; G. MALIVERNI, *Le règlement des différends dans les Organisations internationales économiques*, Institut International de Hautes Études Internationales, Collection de Droit International, A. Sijthoff, Leiden, 1974, at p. 121 ff.; U. VILLANI, *Controversie internazionali*, in *Digesto delle Discipline Pubblicistiche*, Vol. IV, Utet, Torino, 1989, p. 162 ff.; and, with particular reference to the WTO mutually agreed solutions, J. FERNÁNDEZ PONS, *Il Regolamento delle Controversie nel Sistema dell'Organizzazione Mondiale del Commercio*, PhD Thesis, Bologna, 1997, at p. 89 ff.

tions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements *shall* be notified to the DSB and the relevant Councils and Committees, where *any* Member may raise any point relating thereto” (285a), as it is also established for arbitration awards (286). The same technique is provided with regard to panel and Appellate Body reports: their immediate circulation among all the WTO Members is a mandatory pre-condition for their adoption by the representatives sitting in the DSB, and the DSU clearly states the right of every Member “to express its objections” (287) or “views” (288) on those reports before that Body. Thus any kind of solution that may terminate a dispute brought before the WTO — be it a mutually agreed solution, an arbitration award, a panel or an Appellate Body report — receives equal treatment: the diplomatic nature of the conclusion of a WTO dispute by no means entails that the amicable settlement may be considered as a private business between the parties involved in the controversy but, on the contrary, it is seen — in the same way as it happens for a third-party binding decision — as an act of general interest with reference to which the WTO system guarantees a right of immediate knowledge and comment.

The duty of timely notification of mutually agreed solutions (289) is to be undertaken with the utmost seriousness, as demonstrated by the very formulation of the mandatory requirement — the use of the solemn modal verb *shall* and the absence of any possibility of

(285a) Emphasis added.

(286) See article 25:3 DSU.

(287) Article 16:2 DSU.

(288) Article 17:14 DSU.

(289) At least formally, the requirement to notify of mutually satisfactory solutions has a long tradition within the GATT system, and was expressed with the same words in the 1989 *Improvements*. On the previous duties of notification of the agreements *inter partes* for the GATT 1947 Contracting Parties and on the preparatory works of Article 3:6 DSU see J. FERNÁNDEZ PONS, *Il Regolamento delle Controversie nel Sistema dell'Organizzazione Mondiale del Commercio*, cit., at pp. 93 ff. See also E. CANAL-FORGUES, *L'institution de la conciliation dans le cadre du GATT-Contribution à l'étude de la structuration d'un mécanisme de règlement des différends*, Etablissement Emile Bruylant, Bruxelles, 1993, pp. 544 ff, and T.P. STEWART, (ed.), *The GATT Uruguay Round-A Negotiating History (1986-1992)*, cit., pp. 2753 ff.

derogation. It does not come as a surprise then that its diligent implementation has been considered essential for securing "the fullest transparency in the matter of dispute settlement" ⁽²⁹⁰⁾. We have also to consider that direct agreements between the parties are the most common means for solving disputes raised before the DSU ⁽²⁹¹⁾; ignorance of these agreements would compromise the possibility for a proper analysis of the functioning of the DSU mechanism and of the WTO Members perception of the dispute settlement system. Furthermore, the direct settlement devised by the parties is the achievement of the eventual convergence of views on the interpretation of a piece of WTO law which had initially generated a conflict regarding its correct scope: it is then an understanding of the WTO rights and obligations which merits the same attention that is paid to adopted panel and Appellate Body reports.

The breach of the duty to notify of mutually agreed solutions would also be remarkably inconsistent with the general principle of transparency to which an impressive number of provisions in the Marrakech Agreements has been devoted. This principle appears in the form of the duty for WTO Members to make public all pertinent measures through official journals or otherwise publically available means ⁽²⁹²⁾; in that of the request addressed to national administrations to adequately motivate measures on WTO matters concerning other States and private persons ⁽²⁹³⁾; and especially in the form of the duty to notify the competent Bodies of all relevant national trade measures existing at the moment of entry into force of the

(290) Statement by the DSB Chairman Celso Lafer, *DSB Minutes of Meeting* of 24 April 1996, WT/DSB/M/15, part 4.

(291) At the date of 24 June 1998, after three and half years of functioning of the WTO, the "completed cases", i. e. the cases concluded through a panel or Appellate Body report adopted by the DSB are 12, while the "settled or inactive cases" are 28. See the *Overview of the State-of-play of WTO Disputes* dated 24 June 1998.

(292) Among others, see Article X GATT 1994; Article III GATS; and Article 63 TRIPS.

(293) See, for instance, Article 12 of the Agreement on the implementation of Article VI of GATT 1994 and Article 22 of the Agreement on subsidies and countervailing measures, which also establish a duty to give notice of the various phases of the investigation on a dumping practice or on a subsidy to the interested States and private parties.

WTO Agreements, as well as proposals or acts enacted thereafter ⁽²⁹⁴⁾.

To the principle of transparency efforts continue to be devoted even after the entry into force of the WTO. An *ad hoc* Ministerial Decision on Notification Procedures was drafted during the Uruguay Round and then adopted by the General Council ⁽²⁹⁵⁾ so as "to contribute to the transparency of Members' trade policies" and "to affirm their commitment to obligations under the Multilateral Trade Agreements and ... the Plurilateral Trade Agreements regarding publication and notification" ⁽²⁹⁶⁾. The new policy of transparency was further improved by the decision to create a WTO internet site ⁽²⁹⁷⁾, where all the WTO derestricted documents issued since 1 January 1995 may very easily be consulted, and by the adoption of a WTO decision on circulation and derestriction of documents — warmly supported also by the "Quad" Countries ⁽²⁹⁸⁾ — that affirms

(294) For a list of the provisions devoted to the duty of notification by the 12 WTO Agreements on goods of Annex 1A and by GATT 1994 see the document G/L/112/Add.2.

(295) *Ministerial Decision on Notification Procedures*, in *Results of the Uruguay Round of Multilateral Trade Negotiations*, Legal Texts, p. 444, adopted by the General Council on 31 January 1995, WT/GC/M/1, paragraph 9.

(296) The Ministerial Decision provides for the establishment of a Central Registry of Notification and of a Working Group on Notification Obligations and Procedures under the Multilateral Agreements on trade in goods (see Annex 1 A to the WTO Agreement). The Working Group was set up on 20 February 1995 (see G/C/M/1, paragraphs 6.1-6.3), and has already adopted two reports, the 1995 Report of 9 November 1995 (G/L/30) and the 1996 Report of 7 October 1996 (G/L/112), whose annex III has been updated on 21 November 1996 (G/L/112/Add.1) and on 16 July 1997 (G/L/112/Add.2). See also the *Background Note by the Secretariat on Notification Procedures in the GATT since 1979* of 30 June 1995, G/NOP/W/1.

(297) See the internet site <http://www.wto.org>, containing the WTO database Document Dissemination Facility (DDF). WTO Director-General Renato Ruggiero, when presenting the new on-line documentation service, pointed out that "[a]s the youngest of all international organizations, the WTO must make itself well understood and truly accessible. Linking ourselves to millions of internet users all over the world is an important step towards this goal" (see *Ruggiero Inaugurates WTO Information Service on the Internet*, WTO Press Release No. 22 of 26 September 1995).

(298) In the Kobe Quadrilateral Trade Ministers Meeting of 19-21 April 1996, the four major trading countries (Canada, European Union, Japan and the

the principle of immediate circulation of all WTO documents except for those listed in its annex I, which are automatically derestricted after a certain amount of time from their adoption or at the conclusion of the procedure they are referred to, or even before, on special request of a WTO Member ⁽²⁹⁹⁾.

Of course, given the powerful impact of WTO policies within its contracting parties, transparency in WTO affairs is also a fundamental national matter for WTO Members: we may here recall that the US Congress, in the Uruguay Round Agreements Act (URAA) ⁽³⁰⁰⁾, through which the Marrakech Agreements were adopted, expressly requested the USTR Office to improve transparency within the WTO ⁽³⁰¹⁾. Pursuant to this, the USTR has annually

United States) "emphasized the importance of transparency to enhancing the credibility of the WTO, and agreed to urge other WTO members to agree on procedures for derestriction of panel reports and other WTO document." See the Chairman's Statement on the 28th Quadrilateral Meeting issued on 19-21 April 1996.

(299) *Procedures for the Circulation and Derestriction of WTO Documents*, Decision adopted by the General Council on 18 July 1996, WT/L/160/Rev.1. We think that the WTO system has reacted very well to the demands for more transparency in order to foster academic research on trade topics. During the last negotiations, access to GATT documents was considered "one of the most important contributions the Uruguay Round could make to improving the quality of GATT substantive law." Access to the GATT documents was rightly considered as the only way in which "outside scholars and professionals" could develop their "legal criticism" and thus make serious and useful studies for improving the system. See R.E. HUDEC, *Dispute Settlement*, in J.J. SCHOTT (ed.), *Completing the Uruguay Round-A Results-Oriented Approach to the GATT Trade Negotiations*, Washington D.C., 1990, pp. 180-204, at p. 189.

(300) Public Law 103-465 [H.R. 5110]; December 8, 1994. We are grateful to Rachel Shub, Legal Counsel of the USTR, for the information given on the provisions devoted by the URAA to the functions of the USTR within the WTO.

(301) Section 126 of the URAA, *Increased Transparency*, imposes to the US Trade Representative to "seek the adoption by the Ministerial Conference and General Council of procedures that will ensure *broader application of the principle of transparency* and clarification of the costs and benefits of trade policy actions, through *the observance of open and equitable procedures* in trade matters by the Ministerial Conference and the General Council, and by the dispute settlement panels and the Appellate Body under the Dispute Settlement Understanding" (emphasis added).

The US Committee on Ways and Means explained in the following way the need for greater transparency: "... the Committee believes that the WTO will gain

to report to the Congress about "any progress achieved in increasing the transparency of proceedings of the Ministerial Conference and the General Council, and of dispute settlement proceedings conducted pursuant to the Dispute Settlement Understanding" ⁽³⁰²⁾ and must also abide by very severe rules of transparency when the US is party to a dispute ⁽³⁰³⁾.

In such a favourable atmosphere the solemn interpretation that was recently given to the principle of transparency with reference to one of the most famous provisions expressing it, Article X of GATT 1994, should come as no surprise. Requested to intervene on the exact scope to be given to paragraph 2 of that Article ⁽³⁰⁴⁾ the

more respect and build confidence if they follow the US experience of providing more open access to the public with respect to key policy or dispute settlement determinations. It has become a high priority for the US to persuade other member nations of the WTO to work with us to open the process, provide greater access, provide for voices of dissent and differing views to be heard, and in general make the WTO more accountable to those who are affected by international decision-making". See the Legislative History of the URAA, House Report No. 103-826(I), Section 126, *Increased Transparency*, part on the *Reasons for Change*. We are grateful to David Christensen, Attorney, for having provided us with a copy of the URAA and of its Legislative History.

(302) See Section 124, No. 8 of the URAA, *Annual Report on the WTO*.

(303) Every time the US is involved in a case the USTR has to "maintain a public file accessible to the public ... The file shall include all the United States submissions in the proceeding and a listing of any submissions to the Trade Representative from the public with respect to the proceeding, as well as the report of the dispute settlement panel and the report of the Appellate Body" (Section 127, lett. (e) of the URAA, *Access to the WTO Dispute Settlement Process*, emphasis added). Probably, the attention towards transparency in the WTO functioning, especially in the settlement mechanism, was also driven by the views expressed by some pressure groups, already backed by US Courts, that the USTR submissions handed during panel proceedings "contain statements of policy and interpretations adopted by the USTR ... [and] constitute the agency's interpretation of the United States' international obligations", thus requiring to be made public: see the case *Public Citizen v. Office of US Trade Rep.*, in 804 F.Supp. 385 (D.D.C. 1992). We thank Lucinda A. Sikes, Staff Attorney at the Public Citizen Litigation Group, for having provided us with a copy of that decision. For other cases filed regarding secrecy in the international trade process, as well as for demands for a full appraisal of the US Congress by the US Executive with the scope of WTO Agreements and subsequent developments before the ratification vote see *Public Citizen Litigation Group*, 1994 *Annual Report*, in the section devoted to *Separation of powers*.

(304) "No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an

Appellate Body ruled: "Article X:2 ... may be seen to embody a principle of fundamental importance — that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions. The essential implication is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures" (305).

The duty to notify of a mutually agreed solution cannot be considered fulfilled through the notification of the national measure or measures implementing it, or the publication of them or of the same agreement in the national gazettes of the contracting parties. In fact, these notifications or publications physiologically intervene in a later moment in time than the actual notification of a mutually agreed solution: and delay in informing WTO Members of course weakens their institutionalized right to "raise any point relating" to direct solutions before the WTO Bodies, especially before the DSB, thus rendering less effective also the monitoring of the respect of Marrakech law.

A quick glance at the life of the WTO multilateral framework, as well as that of the previous GATT 1947, reveals numerous examples of agreements concluded by two parties which, while settling between them a trade problem involving a GATT or WTO violation, have been considered GATT or WTO inconsistent by a third GATT

established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published". Article X:2 GATT 1994. On the panel case law on this provision see *Analytical Index-Guide to GATT Law and Practice*, Vol. I, WTO, Geneva, 1995, pp. 293 ff.

(305) *United States-Restrictions on Imports of Cotton and Man-made Fibre Underwear*, Report of the Appellate Body of 10 February 1997, WT/DS24/AB/R, Part VI.

or WTO Member, and so emphasize the usefulness of timely notification.

With regard to the GATT 1947 experience a significant example is found in the dispute raised by the EC against the Japan/United States Agreement on Semiconductor Trade signed on 2 September 1986 ⁽³⁰⁶⁾. This agreement concluded a thorny dispute over the pricing of Japanese semiconductors. Japan was accused of dumping by the US administration as well as by the American semiconductor producers, and thus of illegitimately allowing the Asian exports to supersede those of the US. The agreement included a series of commitments undertaken by the Japanese Government in order to improve market access for foreign competitors and to control the export prices of the national enterprises so as to avoid antidumping action, in exchange for which the US agreed to suspend the pending antidumping cases as well as the Section 301 proceedings. Fearing that the Semiconductor arrangement would arbitrarily raise prices of semiconductors and give US firms privileged access to the Japanese market, the EC filed a complaint before the GATT ⁽³⁰⁷⁾ and then went through the entire GATT dispute procedure. The Panel established to issue a report on the case found that the US/Japan agreements restricted Japanese semiconductor exports in violation of GATT 1947 ⁽³⁰⁸⁾. Subsequent to the adoption of the panel report, US and Japan concluded two other agreements, both of which were carefully monitored by the EC Commission ⁽³⁰⁹⁾.

(306) The text of the agreement, with all the relevant annexed documents, is published in *ILM*, 1986, pp. 1408-1428.

(307) See *European Community: Declaration Concerning Japanese-United States Agreement on Semiconductor Trade*, the EC Press Release announcing its request for consultations, reported in *ILM*, 1986, pp. 1621-1622.

(308) See *Japan-Trade in Semi-Conductors*, Report of the Panel adopted on 4 May 1988, in *BISD* 35S/116.

(309) See the *Japan-United States Arrangement Concerning Trade in Semiconductor Products* of 11 June 1991, in *ILM*, 1992, pp. 1078-1093, with an Introductory Note by Simeon M. Kriesberg, pp. 1074-1077. During the negotiations for this second US/Japan Semiconductor Agreement, the EC Commission obtained to hold consultations with both countries on the developments for the new arrangement, and stated that it would verify its consistency with GATT after having read the final text of the bilateral document (see *USA/Japan Agreement on Semiconductors*, EC Press Release IP/91/521 of 5 June 1991).

As far as regards the WTO experience, we have already seen two cases of bilateral agreements deemed to be inconsistent with Marrakech law: in the dispute on *Korean Laws, Regulations and Practices in the Telecommunications Procurement Sector*, and in the *Japanese Measures Affecting the Purchase of Telecommunications Equipment* case ⁽³¹⁰⁾. Also relevant is the attitude adopted by some WTO Members during the US/Japan talks for settling the Automotive dispute: the EC, while hoping for the prompt amicable settlement of the case, clearly stated that "no bilateral deal would be acceptable if it resulted, either in law or in fact, in any discrimination, direct or indirect, against EU interests" ⁽³¹¹⁾ and that "such a bilateral solution had to be fully transparent" ⁽³¹²⁾; Brazil officially declared that "transparency was a cornerstone principle of the multilateral trading system. Any solution to the dispute, including a bilaterally negotiated one, should be made crystal clear to the international community to ensure that solutions incompatible with the multilateral rules that might affect third parties were not arrived at" ⁽³¹³⁾; Australia, being a supplier of auto parts to Japanese auto makers and of raw materials used in Japanese auto manufacturing,

A third USA/Japan Semiconductor Accord has been signed in August 1996 (see *US and Japan Reach Semiconductor Accord*, USTR Press Release No. 96-65 of 2 August 1996), and, again, the EC Commissioner Leon Brittan, after having underlined that the second Agreement "in practice operated to the disadvantage of European semi-conductor producers", expressed the EC Commission's negative views on the US/Japan bilateral policy chosen with regard to semiconductors, and announced a deep study of the final text of the third document (see *Commission Reacts to US-Japan Semi-Conductor Agreement*, EC Press Release IP/96/770 of 5 August 1996).

(310) See *supra*, para. 9.

(311) *Commission Statement on US-Japan Dispute Over Car Imports*, EC Press Release IP/95/447 of 11 May 1995.

(312) See *DSB Minutes of Meeting of 31 May 1995*, WT/DSB/M/5, part 2.

(313) See *DSB Minutes of Meeting of 31 May 1995*, WT/DSB/M/5, part 2. In the same meeting the representative of Norway also underlined the importance of transparency for mutually agreed solutions (WT/DSB/M/5, part 2), and the Canadian representative declared that the positive results of US/Japan negotiations had to be "fully consistent with the WTO rules, transparent and on a m.f.n. basis, not only in the language of the agreement of the parties but also in its implementation." (See WT/DSB/M/5, part 3.)

decided to ask to join DSU consultations ⁽³¹⁴⁾, and, once the Agreement was concluded, it obtained, together with Canada and the EC ⁽³¹⁵⁾, monitoring arrangements with the US and with Japan so as “to continue to ensure that Australian commercial interests are protected” ⁽³¹⁶⁾.

Finally, it is important to remember that the mandatory notification of mutually agreed solutions is also meant to prevent the repetition of the widely-criticized practice of “grey area” trade restriction measures. These were discriminatory, restrictive — and so GATT inconsistent — bilateral agreements establishing voluntary export restrictions, the “power-oriented” instruments *par excellence*. Their inconsistency with the GATT system was remarkable since they did not respect the conditions established by GATT for derogation from the prohibition of tariff and non-tariff trade barriers ⁽³¹⁷⁾, and their adverse trade effects brought them the sad record of being often defined as the worst restrictive instruments ⁽³¹⁸⁾. The voluntary export restraint agreements have also been defined as “the least transparent ... of all instruments of protection” ⁽³¹⁹⁾. The lack

(314) *United States-Imposition of Import Duties on Automobiles From Japan Under Sections 301 and 304 of the Trade Act of 1974*, Request to Join Consultations under Article 4.11 of the DSU, Communication by Australia of 1 June 1995, WT/DS6/3.

(315) See *EU Participates in US-Japan Car Talks*, EC Press Release IP/96/833 of 17 September 1996, where it is reported a statement by Sir Leon Brittan, affirming that the EC objective during those talks was “to ensure that the Agreement is being implemented on a most-favoured-nation basis and that there is no *de facto* or *de jure* discrimination against the commercial interests of European automobile and auto part companies.”

(316) T. GREALLY, *Task Force to Monitor US-Japan Agreement* and *US-Japan Auto Agreement-Australian Monitoring Arrangements Now in Place*, Australia Trade Minister Press Releases of 7 September 1995, MT142.

(317) See E.U. PETERSMANN, *Grey Area Trade Policy and the Rule of Law*, in *JWT*, 1988, no. 2, pp. 23-44.

(318) “[L]es accords d'autolimitation constituent souvent le pire des instruments.” This opinion was expressed by S. JAVELOT, J.M. SIROËN, *Les nouveaux instruments de politique commerciale*, in *Revue économique*, 1994, pp. 487-500, at p. 493.

(319) F. ROESSLER, *The Constitutional Function of the Multilateral Trade Order*, in M. HILF, PETERSMANN, E. U., (eds.) *National Constitutions and International Economic Law*, 1993, Deventer, Boston, pp. 53-62 at p. 59.

of transparency greatly conflicts with the spirit of the GATT system as well as with the internal institutional systems of every single GATT Member. With regard to the first profile, it is well known the GATT preference, among protectionist measures, of tariff barriers just because of their complete transparency, since they make very clear the amount of burden imposed on foreign products and who has to bear it; with regard to the internal institutional system, the problems with VERs lied in the fact that they were often secretly negotiated and subsequently they were not published by the contracting parties: thus they often did not even observe the formal domestic procedural requirements for their adoption ⁽³²⁰⁾.

In light of the vital function assigned to the mandatory requirement of notifying of mutually agreed solutions, we think that the answer to be given to the list of issues prepared by the WTO Secretariat with regard to the scope of Article 3:6 DSU ⁽³²¹⁾ must be affirmative, i. e. all the satisfactory arrangements reached within the "covered agreements" ⁽³²²⁾, independently of whether the request for consultations is filed under the DSU rules, must be notified to the DSB and the relevant Council and Committees.

13. *The fulfilment of the mandatory notification by WTO Members.*

- a) *Through a notice entitled "Notification of Mutually Agreed Solution".*

The Chairman of the DSB, also in light of the "increased transparency in the WTO settlement system ... has drawn the attention" of WTO Members on the observance of this special mandatory requirement of notification ⁽³²³⁾. It is then necessary to

(320) E.U. PETERSMANN, *Constitutional Functions and Constitutional Problems of International Economic Law*, PUPIL, University Press Fribourg Switzerland, 1991, at pp. 106 ff.

(321) *Notification of Mutually Agreed Solutions Under Article 3:6 of the Dispute Settlement Understanding*, Background Note by the Secretariat of 7 August 1996, WT/DSB/W/35.

(322) They are indicated in Appendix 1 to the DSU.

(323) From the *Summary Conclusions of the 1996 Annual Report of the Dispute Settlement Body* of 28 October 1996, WT/DSB/8.

investigate how WTO Members have fulfilled this rule of transparency so far.

A settlement may be jointly notified by the parties of the dispute to the DSB through a communication entitled "Notification of Mutually Agreed Solution" in the form of an exchange of letters. We have already seen that that was the case in the *Scallops*, *US Textiles Rules* and *Indian import restrictions* disputes; and it has also happened for the *Korean Measures Concerning the Bottled Water* complaint, raised by Canada ⁽³²⁴⁾. The Korean laws and regulations, questioned by the Complainant on the basis of various provisions of the SPS Agreement, the TBT Agreement and GATT 1994, concerned the shelf-life of bottle water, fixed at 6 months from its production date, and prohibiting any chemical treatment, including disinfection by ozonation. In the exchange of letters resolving the dispute, Korea undertook to "take every measure available under its authority to amend the relevant laws and regulations with a view to allowing the importation, sales and distribution of ozone-treated bottled water by January 1, 1997 if possible, but not later than April 1, 1997" ⁽³²⁵⁾. It was to submit a bill to amend the Drinking Water Management Act to the National Assembly so as to eliminate definitively its inconsistency with WTO law and, as soon as the Act was modified, implement any regulatory change. "[A]t the earliest opportunity", Korea had to provide Canada with copies of the draft bill and of its enforcement regulations; furthermore, it was "to establish technical regulations on the use of ozonation so as not to create an unnecessary obstacle to international trade". Meanwhile, in order to immediately improve access to its market while waiting for the changes expected by the beginning of the spring 1997, the Government of Korea had to take provisional measures, consisting in providing the Canadian Government with all the relevant regulations permitting an extension of shelf-life and with "other materials necessary to help understand the procedure". The Canadian

(324) *Korea-Measures Concerning the Bottled Water*, Request for Consultations by Canada of 8 November 1995, WT/DS20/1.

(325) *Korea-Measures Concerning the Bottled Water*, Notification of Mutually Agreed Solution of 24 April 1996, WT/DS20/6.

Government in its letter of 1 April 1996 acknowledging receipt of that of Korea added to the customary *formulae* a final statement indicating that it viewed the agreement just only as "a temporary solution for this issue", and that it intended "to continue to encourage Korea to adopt a manufacturer determined shelf-life system for bottled water", a principle that Korea had already extensively accepted in the Shelf-Life Agreement concluded with the United States with regard to other products.

In the other cases notified under the heading "Notification of Mutually Agreed Solution", the chosen form has not been the exchange of letters, but rather a single text. This was the case for all the four disputes concerning the TRIPS Agreement concluded with a mutually agreed solution. For two cases the object of the dispute was the same: both the US and the EC introduced a request for consultations against Japan, alleging its infringement of the TRIPS' obligations regarding the protection of sound recordings. As a developed country, Japan was to implement its TRIPS obligations by 1 January 1996: these obligations include the granting of 50 years of protection to producers and performers of sound recordings. However, Japan's amendments to its copyright law protected only the sound recordings produced after 1 January 1971. Both the US and the EC felt this to be insufficient and thus requested consultations ⁽³²⁶⁾. At the beginning of 1997 both disputes with Japan were bilaterally settled, since the Asian Government promised to modify to its law in order to protect sound recordings for 50 years, modifications which became effective on 25 March 1997 ⁽³²⁷⁾.

(326) *Japan-Measures Concernings Sound Recordings*, Request for Consultations by the United States of 9 February 1996, WT/DS28/1 and *Japan-Measures Concernings Sound Recordings*, Request for Consultations by the European Communities of 24 May 1996, WT/DS42/1. See also *USTR Kantor Initiates WTO Dispute Settlement Proceedings Against Japan for Its Sound Recordings Copyright Practices*, USTR Press Release 96-15 of 9 February 1996, and *EU Takes Action Against Japanese Rules on Music Piracy*, EC Press Release IP/96/165 of 22 February 1996.

(327) *Japan-Measures Concernings Sound Recordings*, Notification of Mutually Agreed Solution of 24 January 1997, WT/DS28/4, *Japan-Measures Concernings Sound Recordings*, Notification of Mutually Agreed Solution of 7 November 1997, WT/DS42/4. See also *USTR-Designate Barshefsky Announces Resolution of*

In a case with Portugal, the US questioned the amendments that Portugal had made in 1995 to its patent law, since they did not provide for the patent term required by the TRIPS Agreement ⁽³²⁸⁾. Shortly after, the parties notified their mutually agreed solution, agreeing on the interpretation to be given to the pertinent TRIPS provisions, which were used by Portugal to draft its new Decree establishing the duration of patent' protection ⁽³²⁹⁾. One dispute involved a less-developed country, Pakistan, and the United States. Their mutually agreed solution was devised after the United States asked for the establishment of a panel. The American Government claimed that Pakistan had not implemented those provisions of the TRIPS Agreement requiring either to grant protection for pharmaceutical and agricultural chemical products as of the date of its entry into force or to establish a system of interim filing procedures for such inventions always by 1 January 1995 ⁽³³⁰⁾. In the agreement notified to the DSB ⁽³³¹⁾, the parties followed the same technique used in the US/Portugal settlement: they jointly stated how the relevant provision of the TRIPS Agreement ⁽³³²⁾ was to be understood. The common understanding on the TRIPS obligations was to be implemented in Pakistan by a Presidential Ordinance which had been issued two weeks prior to the notification. The notification

WTO Dispute With Japan on Sound Recordings, USTR Press Release No. 97-04 of 24 January 1997 and *EU and Japan Resolve Music Copyright Dispute*, EC Press Release IP/97/16 of 16 January 1997.

(328) *Portugal-Patent Protection Under the Industrial Property Act*, Request for Consultations by the United States of 30 April 1996, WT/DS37/1.

(329) *Portugal-Patent Protection Under the Industrial Property Act*, Notification of a Mutually Agreed Solution of 3 October 1996, WT/DS37/2. See also *US Gains IPR Compliance in Portugal Through WTO Case*, USTR Press Release No. 96-80 of 3 October 1996.

(330) *Pakistan-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Request for consultations by the United States of 30 April 1996, WT/DS36/1; *Pakistan-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Request for the Establishment of a Panel by the United States of 3 July 1996, WT/DS36/3.

(331) *Pakistan-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Notification of a Mutually Agreed Solution of 28 February 1997, WT/DS36/4.

(332) Article 70, paragraphs 8 and 9, of the TRIPS Agreement.

then explained how that Ordinance would have been applied, and what would have been the content of the regulations to be issued, as soon as possible, so as to comply with the principles established by the Ordinance.

We have also an example of an agreement notifying only of the general principle to be implemented by the respondent. It is the *Turkey — Taxation of Foreign Film Revenues* case, regarding the US complaint against the Turkey's discriminatory system of box office taxation on the showing of films, which was of 25% for foreign films while no such tax was imposed on the Turkish film industry ⁽³³³⁾. After the request for the establishment of a panel ⁽³³⁴⁾, a mutually agreed solution was reached and notified to the DSB ⁽³³⁵⁾. The parties agreed on the principle to be followed by Turkey so as to bring its taxation system into conformity with Article III of GATT 1994: Turkey was to equalize "any tax imposed in Turkey on box office receipts from the showing of domestic and imported films ... as soon as reasonably possible." Turkey honoured its commitment five months later, when "the Turkish Council of Ministers published a regulation which lowered the tax on foreign films from 25% to 10%, while raising the tax on domestic films from 0% to 10%" ⁽³³⁶⁾.

As discussed above ⁽³³⁷⁾, in other two cases, the *Poland — Import Regime for Automobiles* ⁽³³⁸⁾ case, and the *Korea — Measures Concerning the Shelf-Life of Products* case ⁽³³⁹⁾, the two disputants adopted the same correct technique of jointly drafting a

(333) *Turkey-Taxation of Foreign Film Revenues*, Request for Consultations by the United States of 12 June 1996, WT/DS43/1.

(334) *Turkey-Taxation of Foreign Film Revenues*, Request for the Establishment of a Panel by the United States of 9 January 1997, WT/DS43/2.

(335) *Turkey-Taxation of Foreign Film Revenues*, Notification of Mutually Agreed solution of 14 July 1997, WT/DS43/3.

(336) *US Trade Representative Charlene Barshefsky Announces Resolution of WTO Dispute with Turkey on Films Taxes*, USTR Press Release No. 97-108 of 19 December 1997.

(337) See *supra*, para. 9.

(338) *Poland-Import Regime for Automobiles*, Notification of Mutually Agreed Solution of 26 August 1996, WT/DS19/2.

(339) *Korea-Measures Concerning the Shelf-Life of Products*, Notification of Mutually Agreed Solution of 20 July 1995, WT/DS5/5.

text and then notifying of their bilateral agreement. Very recently, Switzerland and Australia did the same with their communication to the WTO of their mutually agreed solution in the *Australia — Anti-Dumping Measures on Imports of Coated Woodfree Paper Sheets* case ⁽³⁴⁰⁾. In this controversy, the complainant argued that provisional anti-dumping measures applied by the Australian authorities to coated woodfree paper in sheets originating from Switzerland were inconsistent with the 1994 Anti-Dumping Agreement. Australia had already decided to terminate its trade defense measures when Switzerland filed the case before the WTO ⁽³⁴¹⁾: subsequently the two countries agreed that the withdrawal of the anti-dumping duties and the reimbursement of the securities already seized would settle the case.

However, among the WTO documents entitled “Notification of a Mutually-Agreed Solution”, there are two notices which, in our opinion, may not be considered as proper notifications. We have already reported of the content of the dispute concerning one of the two cases, the controversy on *Korean Laws, Regulations and Practices in the Telecommunications Procurement Sector*. The few lines which form the text of the document circulated to the DSB by Korea and the EC inform that the two parties “have reached a mutually satisfactory solution to the matter” and that “[b]ased on these developments [they] have agreed to terminate consultations on this matter” ⁽³⁴²⁾: nothing more is added, as nothing more is added by the second document, that concerning the *Japan - Procurement of a Navigation Satellite* case, where, again, all that may be read is that the disputants, the EC and Japan, “have found a mutually agreed

(340) See *Australia-Anti-Dumping Measures on Imports of Coated Woodfree Paper Sheets*, Request for Consultations by Switzerland of 20 February 1998, WT/DS119/1 and *Australia-Anti-Dumping Measures on Imports of Coated Woodfree Paper Sheets*, Notification of Mutually Agreed Solution of 13 May 1998, WT/DS119/2

(341) Information obtained by the Australian Department of Foreign Affairs.

(342) *Korea-Laws, Regulations and Practices in the Telecommunications Procurement Sector*, Notification of a Mutually Agreed Solution of 22 October 1997, WT/DS40/2.

solution, within the meaning of Article 3.6 of the DSU.”⁽³⁴³⁾. In particular, in this second case the EC questioned a procurement tender by the Ministry of Transport of Japan to purchase a multi-functional satellite for the installation of a Global Navigation Satellite System (MSAS) for Air Traffic Management, alleging that it “seriously” infringed the non-discrimination and transparency provisions of the WTO Government Procurement Agreement (GPA)⁽³⁴⁴⁾. The Japanese call for tender was deemed discriminatory under Article III GPA since, by requiring the use of US technical specifications, it automatically excluded EC companies; it also violated Article 6:3 GPA because its technical specifications were not made in terms of performance, but by reference to a particular US system, the US WAAS specifications. Furthermore, these specifications were not public, and thus infringed the GPA provision on transparency in tender documentation, Article XII:2, which requires that tender documentation contain all information necessary to permit suppliers to submit responsive tenders⁽³⁴⁵⁾.

It is evident that the US was greatly interested in knowing what had actually been agreed by the EC and Japan, and so could not possibly have been satisfied with the kind of notification made by the EC. In fact, the US requested information on that mutually agreed solution before the Committee on Government Procurement⁽³⁴⁶⁾, and finally obtained a Joint Statement by the EC and Japan explaining the content of their understanding⁽³⁴⁷⁾. This document reports that “the EC Commission and the Ministry of Transport of Japan have reached a settlement through the establishment of a coopera-

(343) *Japan-Procurement of a Navigation Satellite*, Notification of a Mutually Agreed Solution of 31 July 1997, WT/DS73/4/Rev.1.

(344) See the EC Press Release *Commission Takes Japan to WTO for Favoursing US Bidders for Satellite System*, IP/97/253 of 1 April 1997.

(345) *Japan-Procurement of a Navigation Satellite*, Request for Consultations by the European Community of 26 March 1997, WT/DS73/1.

(346) See the 1997 *Report of the Committee on Government Procurement* of 29 October 1997, GPA/19, para. 19.

(347) *Joint Statement for Follow-Up to US Enquiry in the WTO Committee on the Agreement on Government Procurement and the Dispute Settlement Body Concerning Resolution of MSAS Complaint by the European Communities and Japan* of 3 March 1998, WT/DS73/5.

tion between the European Tripartite Group (consisting of the European Commission, the European Space Agency and Eurocontrol) on the one hand and the [Japanese Minister of Transport] on the other" in order to reach interoperability of telecommunications, which guarantees safety in navigation and improves EC/Japan industrial cooperation. The final paragraph of the Joint statement, defined by the EC and Japan also as a "political understanding" ⁽³⁴⁸⁾, clearly states that "the requirements for interoperability will be mentioned in MSAS ⁽³⁴⁹⁾ and EGNOS ⁽³⁵⁰⁾ documentation for all future procurement in and after 1998, on condition that both sides reach the conclusion that the interoperability is feasible".

Therefore, the simple notice of having reached an agreement, without reporting its content may not be absolutely considered a fulfilment of the duty to notify expressed by Article 3:6 DSU: if the full content is not reported it is not possible "to raise any point relating thereto." This sort of "formal" notification does not achieve the purpose of the special mandatory requirement of transparency, i. e. to provide all WTO Members with a notice of the terms of any settlement, allowing them to assess its consistency with the Marrakech system and to monitor its implementation in the most effective way.

Furthermore, the notification of a mutually agreed solution has to be not only adequately detailed in reporting what the disputants have agreed on, but also promptly made, even if it concerns only the guiding principles. This aspect of the scope of the rule of transparency enshrined in Article 3:6 DSU has been pointed out by some WTO Members with regard to the behaviour held by the US and the EC in their dispute over US rules of origin for textiles ⁽³⁵¹⁾. Considering to have "a substantial trade interest" ⁽³⁵²⁾, those WTO

(348) From an interview with an EC Commission official, November 1997.

(349) I.e. the Global Navigation Satellite System for Air Traffic Management (MSAS). See immediately *supra* in the text.

(350) I.e. the European Navigation Overlay Service (EGNOS). The author is grateful to Jonathan Stoodley, EC Commission official, for the information given on the Japanese Navigation Satellite case.

(351) See *supra*, para. 9.

(352) Article 4: 11 DSU.

Members asked to join the consultations and obtained the respondent's acceptance, as requested by the DSU (353). On 15 July 1997, the evening before the day scheduled for the first meeting, these countries were informed by a joint US/EC communication that consultations would not be held until further notice. They were not told of the circumstances which had led to the sudden cancellation. "However, in the meantime, certain media reports suggested that the United States and the Communities had reached a mutually agreed solution on this matter", which was not communicated to the WTO. Therefore, at the next DSB meeting on 30 July 1997, the interested WTO Members complained about the lack of notification, claiming it impeded the knowledge of "the multilateral implications" of any amicable settlements which were "a matter of interest to all Members", and of course especially to those countries that had asked to be joined in consultations (354).

As we have already seen, the US and the EC did notify of their mutually agreed solution, but at the end of February 1998, six months after the DSB meeting. That period of time was necessary for the USTR Office to coordinate with the US Congress and then to draft a final text that would be accepted by the EC Commission, which had already agreed on the guiding principles in mid July. In our opinion, those guiding principles, if deemed definitive by the disputants, should have been notified to the WTO as soon as they were established, i. e. in July 1997, like the US and Turkey did in the *Turkey - Taxation of Foreign Film Revenues* case. Conversely, had the US and the EC considered those principles still "negotiable", then, in our opinion, they had to go on negotiating within the DSU, in the presence of the other authorized WTO Members. They ought to have accepted the consequences of bringing their case before the WTO on the basis, among others, of Article XXII GATT 1994 and

(353) "Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB." Article 4: 11 DSU. The requesting WTO Members were Switzerland, Honduras, Hong Kong, Pakistan, India, Japan and the Dominican Republic.

(354) See the *DSB Minutes of Meeting* of 30 July 1997, WT/DSB/M/36, part 6.

of having accepted the participation of third countries in their consultations.

Article XXII GATT 1994, like the corresponding provisions of the other WTO Agreements ⁽³⁵⁵⁾, in conjunction with Article 4:11 DSU, allows for a third WTO Member having a substantial interest in consultations to join in them provided that the respondent agrees. Once the choice of the complainant to base its request for consultations on Article XXII GATT 1994 and/or on other corresponding consultation provision is followed by the respondent's acceptance of a third WTO Member to join the DSU consultations there is the accomplishment of a right of participation of the third WTO Member, a right which may terminate only with the conclusion of the dispute, be it an amicable settlement or a panel or Appellate Body report. Both types of solution have to be notified to the DSB and to the relevant Councils and Committees where, by raising any point relating thereto and expressing its views, a WTO Member may continue to protect its "substantial trade interest" ⁽³⁵⁶⁾.

- b) *"Points" already raised before the DSB by WTO Members third parties to notified mutually agreed solutions.*

With reference to the right "to raise any point", two mutually agreed solutions, notified to the DSB and the other WTO relevant Committees or Councils, merit comment. The first concerns the implementation and interpretation of the commitments undertaken upon by Korea in the US/Korea Shelf-Life Agreement. As previously discussed, that agreement concluded the dispute between the US and Korea regarding the latter's shelf-life system based on mandatory governmental requirements rather than scientific motivation. The settlement established that Korea should gradually modify its measures, substituting the government-imposed standards with the "use-by" dates determined by the manufacturers of the goods. Korea had to notify the WTO of a detailed list of all the items whose Korean shelf-life requirement had been or would be modified, and it had to use the

(355) The corresponding consultation provisions are listed in footnote 4 of Article 4:11 DSU.

(356) Article 4: 11 DSU.

Harmonized System (HS) for identifying all the products. Korea's method for implementing this duty of notification ⁽³⁵⁷⁾ raised "serious concern" ⁽³⁵⁸⁾ in its direct counterpart, the US, as well as in the other interested WTO Members, Australia and Canada. During official WTO meetings, the US clearly stated its disappointment in the implementation of the agreement, deeming it incomplete and confused, and realized on the basis of a unilateral interpretation of the agreement. In particular, Korea had not respected the obligation to identify the items no longer subject to shelf-life requirements through the HS classification: on the contrary, it had established that the products imported to Korea were to "comply with the criteria and specifications provided by the Korean Food Code" ⁽³⁵⁹⁾, thus giving that Code precedence over the agreement, a choice which, in the US view, "could nullify the entire agreement". In fact, this conduct frustrated the very purpose of the HS classification requirement, that of avoiding "any misunderstanding as to the coverage of the agreement." On the same official occasions, Australia and Canada declared that they shared the US' views, complaining of insufficient transparency of the Korean implementing measures. In particular, Canada remarked that "the agreement did not cover bottled water", and in fact filed its own case on that point just in that period ⁽³⁶⁰⁾. Korea invited the interested

(357) See the communications by Korea WT/DS5/5/Add.1 of 12 October 1995, WT/DS5/5/5/Add.1/Rev.1 of 26 January 1996, WT/DS5/5/5/Add.2 of 26 January 1996, WT/DS5/5/5/Add.3 of 26 January 1996, WT/DS5/5/5/Add.4 of 1 July 1996, and WT/DS5/5/5/Add.5 of 9 August 1996. See *USTR Monitors Korean Shelf-Life Agreement*, USTR Press Release no. 96-08 of 22 January 1996, which reports that the conclusion of the Shelf-Life Agreement was followed by bilateral technical talks to define the details of the extension of the manufacturer-determined "use-by" dates principle to new products; subsequent to the successful conclusion of those talks, the Government of Korea notified the list of new products to the WTO Secretariat.

(358) See *DSB Minutes of Meeting of 1 and 29 November 1995*, WT/DSB/M/9, part 4; *Committee on Sanitary and Phytosanitary Measures*, Summary of the Meeting Held on 15-16 November 1995, G/SPS/R/3, section devoted to *Implementation of the Agreement-Information from Members*; and *Committee on Sanitary and Phytosanitary Measures*, Statement Made by the United States at the Meeting of 15-16 November 1995, G/SPS/W/41.

(359) This is the wording used by Korea in its first notification WT/DS5/5/Add.1.

(360) *Korea-Measures Concerning the Bottled Water*, Request for Consul-

WTO Members to take into consideration the technical difficulties involved in converting the classification system of the Korean Food Code into the HS headings, as well as the fact that it had made only the first of a series of notifications, so that "[i]t would be premature to say that some of the products covered by the July Agreement are not included in the said notification" ⁽³⁶¹⁾. It then began intensive technical bilateral talks with the US so as to clarify the exact meaning of each point of the Korean regulatory system about which the US had doubts ⁽³⁶²⁾.

The mutually agreed solution in the *Poland — Import Regime for Automobiles* case was also object of a request for clarification before the DSB, where the US asked for more information on the functioning of the import quota fixed by India and Poland ⁽³⁶³⁾.

These examples demonstrate the vital role of transparency in the prompt and effective functioning of the WTO system: a simple notification may allow a multilateral, timely and effective debate on WTO provisions or subsequent measures implementing them. Furthermore, the possibility to be kept abreast of the content and the implementation of mutually agreed solutions concluded between other WTO Members allows any interested third party to concentrate its own WTO task force on other WTO matters, thus strengthening WTO Members' skills of monitoring the observance of trade rules, and promoting the consistency with the Marrakech system of policies and measures of all its signatories.

c) *Other means of giving notice of satisfactory solutions.*

In two cases the complaining parties notified the DSB of the complete withdrawal by the respondents of the measures alleged to be in violation with WTO law. One was the controversy raised

tations by Canada of 8 November 1995, WT/DS20/1, discussed *supra*, para. 13 lett. a).

(361) *Committee on Sanitary and Phytosanitary Measures*, Statement Made by Korea at the Meeting of 15-16 November 1995, G/SPS/W/43.

(362) See *USTR Monitors Korean Shelf-Life Agreement*, USTR Press Release no. 96-08 of 22 January 1996.

(363) See *DSB Minutes of Meeting* of 27 September 1996, WT/DSB/M/22, part 3.

between Mexico and Venezuela regarding the Venezuelan administration's anti-dumping investigation of some Mexican products ⁽³⁶⁴⁾. Following the closing of the investigation, and ten days after the complaint was filed, Mexico announced that "the consultations which it requested are unnecessary in view of the fact that the competent authorities of Venezuela have decided to close the investigation in question" ⁽³⁶⁵⁾. In the *United States — Measures Affecting Imports of Women's and Girls' Wool Coats* case ⁽³⁶⁶⁾. India informed the DSB that, following the United States' withdrawal of the restraint on the specific textile products in question, it had decided not to request anymore the establishment of the panel ⁽³⁶⁷⁾.

For the remaining cases, notification occurred in the form of statements made by one of the complaining parties before the DSB, press releases issued by one of the disputants, or the publication of the agreement in the Official Journal of the contracting parties. In one case, notification was made to the WTO Director General ⁽³⁶⁸⁾. For instance, the US/Japan Automotive Agreement has been given notice of by Japan before the DSB ⁽³⁶⁹⁾ — where it announced also the withdrawal of its request for consultations — the General Council ⁽³⁷⁰⁾ and the Council for Trade in Goods ⁽³⁷¹⁾; in the

(364) *Venezuela-Anti-Dumping Investigation in Respect of Imports of Certain Oil Country Tubular Goods (OCTG)*, Request for Consultation by Mexico of 5 December 1995, WT/DS23/1.

(365) *Venezuela-Anti-Dumping Investigation in Respect of Imports of Certain Oil Country Tubular Goods (OCTG)*, Notification Concerning Consultations of 6 May 1997, WT/DS23/2.

(366) *United States-Measures Affecting Imports of Women's and Girls' Wool Coats*, Communication from India of 25 April 1996, WT/DS32/2.

(367) See all the details on the consistency of the US conduct with the WTO Agreement on Textiles and Clothing (ATC) in *United States - Measures Affecting Imports of Women's and Girls' Wool Coats*, Request for the Establishment of a Panel by India of 14 March 1996, WT/DS32/1.

(368) See the next paragraph, where it is reported the US/EC disputes on duties on imports of grains WT/DS13.

(369) *DSB Minutes of Meeting* of 19 July 1995, WT/DSB/M/6, part 9.

(370) *Council for Trade in Goods, Minutes of Meeting* of 3 July 1995, G/C/M/4, part 7.

(371) See *Japan-United States: Auto and Auto Parts Issues*, Statement by Japan at the Meeting of the General Council on 11 July 1995, WT/GC/COM/3. We

Hungary — Export Subsidies in Respect of Agricultural Products dispute ⁽³⁷²⁾, the disputants agreed to “transfer” the case under Article XXVIII GATT 1994, pursuant to which Hungary had to seek a waiver for certain of its WTO obligations ⁽³⁷³⁾, and Australia, on behalf of all the complainants, announced this settlement at the DSB meeting of 31 July 1997 ⁽³⁷⁴⁾; this was the case also for the already reported dispute between Singapore and Malaysia ⁽³⁷⁵⁾, and of the controversy which opposed the EC to the US because of the 1987 Presidential Proclamation and its implementing measures ⁽³⁷⁶⁾, issued by the US in response to the EC Directive banning hormones treated beef ⁽³⁷⁷⁾. With regard to this last case, besides the mere announcement of having reached an agreement, the DSB Meeting records the various phases leading to and the reasons allowing its conclusion ⁽³⁷⁸⁾. At the moment of the request for the establishment of the panel, the EC asked for 24 hours of suspension so as to verify

have to underline here that the text of the Automotive Agreement is widely available: see for instance its publication on *ILM*, *supra* at footnote 199.

(372) *Hungary-Export Subsidies in Respect of Agricultural Products*, Request for Consultations by Argentina, Australia, Canada, New Zealand, Thailand and the United States of 27 March 1996, WT/DS35/1.

(373) Hungary has always maintained the legitimacy of its questioned measures, claiming that were left out from the Uruguay Round Schedule due to a clerical error. See the *DSB Minutes of Meeting* of 25 February 1997, WT/DSB/M/29, part 3 and *WTO Focus* No. 23, October 1997, at p. 4.

(374) See the *DSB Minutes of Meeting* of 30 July 1997, WT/DSB/M/36, part. 5. In *WTO Focus* No. 23, October 1997, at p. 4, it is reported that on 6 October 1997 the WTO Council for Trade in Goods recommended to the General Council the granting of a waiver to agricultural subsidies by Hungary until the end of 2001.

(375) Singapore announced its withdrawal of its request for the establishment of a panel (WT/DS1/2) at the DSB meeting of 19 July 1995. See *DSB Minutes of Meeting* of 19 July 1995, WT/DSB/M/6, part 6, quoted *supra*, para. 9.

(376) See *United States-Tariff Increases on Products From the European Communities*, Request for Consultation by the European Communities of 17 April 1996, WT/DS39/1, and *United States - Tariff Increases on Products From the European Communities*, Request for the Establishment of a Panel by the European Communities of 19 June 1996, WT/DS39/2.

(377) EC Hormones, Section 301-62. For a complete history of the 1987 Presidential Proclamation at the heart of the dispute see the *Section 301 Table of Cases* issued by the Office of the USTR, in <http://www.ustr.gov/301/active.htm>.

(378) *DSB Minutes of Meeting* of 15-16 July 1996, WT/DSB/M/21, part 1.

the content of a positive development announced by the US regarding the termination of its contested measures. The following day, before announcing to the DSB its decision not to pursue its panel request, the EC asked the US representative to confirm before the DSB what had already been privately communicated. The North-American representative confirmed that the application of increased duties for certain EC products had been terminated at 12.01 Washington DC time on 15 July, 1996, and, even if not yet published, the restoration of MFN duties for EC exports were already effective ⁽³⁷⁹⁾. The reason for the EC request of public statement is very clear: it wished to obtain an official record of the content of the US modalities to terminate its questioned unilateral measures and thus a WTO document on which to rely in case the US adopted rules different from those it described before the DSB. Under such circumstances the EC would immediately resume its request for a panel, without having to introduce a new complaint.

On (luckily) a few occasions, a party to a dispute has issued a press release to inform of the settlement of its dispute, which has never been followed up with formal notification to the WTO. In general these press releases are limited at stating that an agreement was reached and give no indication of the content. This occurred in the *Japanese Measures Affecting the Purchase of Telecommunications Equipment* dispute ⁽³⁸⁰⁾, and in the controversial *Australia — Textile, clothing and Footwear Import Credit Scheme* case ⁽³⁸¹⁾. In this latter case a solution was announced by the USTR in a press release in November 1996 ⁽³⁸²⁾: since then, however, the US has introduced two other requests for consultations on the same issues,

(379) The US representative specified that the termination of the sanctions, and thus the MFN rate of duty, included also the Italian canned tomatoes which were in the process of export towards the US.

(380) See *supra*, para. 9.

(381) *Australia-Textile, clothing and Footwear Import Credit Scheme*, Request for Consultations by the United States of October 1996, WT/DS57/1.

(382) *US and Australia Reach Settlement on Leather Products Trade Dispute*, USTR Press Release No. 96-91 of 25 November 1996. The text of the exchange of letters through which the agreement was concluded was not attached to the Press Release.

obviously deeming insufficient the 1996 settlement ⁽³⁸³⁾. Also the settlement in the *Fresh or Chilled Tomato from Mexico* case ⁽³⁸⁴⁾ was reported by a press release. The measure in question in this last controversy was the anti-dumping investigation started by the US administration on imports of fresh or chilled tomatoes from Mexico. Mexico refrained from pursuing the DSU procedures it had initiated when, in October 1996, the US Department of Commerce reached a "suspension agreement" with Mexican producers and exporters ⁽³⁸⁵⁾ on the respect of a reference price for the products imported to the US market ⁽³⁸⁶⁾. Another example is the March 1998 press release announcing that the USTR had settled the dispute with Brazil regarding its trade-distorting investment system, which illegitimately benefitted Brazilian auto and auto parts manufacturers. The Latin American Country agreed to eliminate its non-WTO consistent measures ⁽³⁸⁷⁾.

Finally, with regard to the dispute raised by Thailand against the

(383) See *Australia-Subsidies Provided to Producers and Exporters of Automotive Leather*, Request for Consultations by the United States of 10 November 1997, WT/DS106/1 and *Australia-Subsidies Provided to Producers and Exporters of Automotive Leather*, Request for Consultations by the United States of 4 May 1998, WT/DS126/1.

(384) *United States-Anti-Dumping Investigation Regarding Imports of Fresh or Chilled Tomatoes from Mexico*, Request for Consultations by Mexico of 1 July 1996, WT/DS49/1. In the *Overview of the State-of-play of WTO Disputes* dated 24 June 1998, at Section 8 B, *Settled or Inactive Cases*, no. 13 it is stated that "US Commerce Department official releases indicate that the case has been settled."

(385) The suspension agreement was signed by the US Department of Commerce (Import Administration), and by Confederacion de Asociaciones Agricolas del Estado (CAADES) and the Confederacion Nacional de Productores de Hortalizas (CNPH).

(386) Interview of 20 November 1997 with Steve Powell, Chief Council for US Import Administration, and US negotiator for the WTO dispute with Mexico. Thanks to Mr. Powell also for having provided a copy of the Suspension agreement on fresh tomatoes from Mexico.

(387) See *Brazil-Certain Measures Affecting Trade and Investment in the Automotive Sector*, Request for consultations by the United States of 9 August 1996, WT/DS52/1, and *United States Trade Representative Charlene Barshefsky Signs Agreement with Brazil on Autos*, USTR Press Release No. 98-28 of 16 March 1998.

EC for its duties applied to rice ⁽³⁸⁸⁾, the two disputants reached a solution concerning the opening by the EC of new tariff contingents for manioc and rice: the parties did not notify that solution to the DSB, but the EC published it in the Official Journal of the European Communities ⁽³⁸⁹⁾. The same kind of divulgation was given to another agreement settling a WTO dispute on agricultural matters in the case raised by Canada against the EC over the latter's duties on imports of cereals ⁽³⁹⁰⁾: therefore, while not being notified to the DSB, the text of the mutually agreed solution was published in the EC Official Journal ⁽³⁹¹⁾.

14. *Benefits of the notifying WTO Members.*

Besides allowing all WTO Members "to raise any point" regarding the conclusion of a dispute, the notification of mutually agreed solutions is also in the interest of the parties involved in the controversy. In fact, supposing that one of the parties to the settlement is not satisfied with its counterpart's implementation of the duties undertaken, the choice of the written form for the agreement and its subsequent notification to the DSB will provide each WTO Member with an official text from which it will be possible to evaluate the exact scope of the obligations took upon, and to assess if those commitments have been met.

Besides the *Korea — Measures Concerning the Shelf-Life of Products* case, discussed above, we may refer of some other ex-

(388) *European Communities-Duties on Imports of Rice*, Request for Consultations by Thailand of 3 October 1995, WT/DS17/1.

(389) See the Council decision of 13 May 1996 no. 96/317/EC concerning the conclusion of the results of consultations with Thailand under GATT Article XXIII, in *OJEC* L122/15 of 22 May 1996.

(390) *European Communities-Duties on Imports of Cereals*, Request for Consultations by Canada of 30 June 1995, WT/DS9/1.

(391) See Council decision of 22 December 1995 No. 95/591/EC concerning the conclusion of the results of negotiations with certain third countries under GATT Article XXIV:6 and other related matters (United States and Canada), in *OJEC* L334/25 of 30 December 1995, at pp. 35-37, reporting the full text of the exchange of letters settling the dispute WT/DS9.

amples concerning opposing views on the fulfilment of the obligations undertaken: in one case, like the *Korea Shelf-Life* case, the agreement settling the dispute was notified; in the other, no arrangement was notified.

The first dispute was brought by the US against the EC duties on imports of grains, alleging their inconsistency with GATT 1994 and the Agreement on the implementation of Article VII of GATT 1994 ⁽³⁹²⁾. In November 1995, after the request for the establishment of a panel ⁽³⁹³⁾, the EC and the US reached an agreement ⁽³⁹⁴⁾. This agreement was drafted in two exchanges of letters, the "Exchange of letters between the European Community and the United States on a settlement for cereals and rice", and the "Exchange of letters between the European Community and the United States on rice prices", signed by the EC on 30 December 1995, and by the US only on 22 July 1996. These exchanges of letters were notified to WTO Director General Ruggiero by a joint letter signed on 22 July 1996 by the EC and the US Delegations together with the Agreement concluding their negotiations under Article XXIV:6 GATT 1994 consequent to the accession to the European Union of Austria, Finland and Sweden ⁽³⁹⁵⁾.

(392) *European Communities-Duties on Imports of Grains*, Request for Consultations by the United States of 19 July 1995, WT/DS13/1. See also the USTR Press Release No. 95-52 of 19 July 1995.

(393) *European Communities-Duties on Imports of Grains*, Request for the Establishment of a Panel by the United States of 28 September 1995, WT/DS13/2.

(394) While expressing its concerns for the delay by the European Communities to implement the mutually agreed solution, the US indicated when, together with the EC, it initialled the agreement: see *DSB Minutes of Meeting* of 22 January 1997, WT/DSB/M/28, section 8. See also *USTR Mickey Kantor Welcomes European Council Approval of Agreements with the European Union on EU Enlargement Compensation and EU Grain Import Policies*, USTR Press Release No. 95-89 of 4 December 1995.

(395) Thus, the notification made to the WTO Secretariat contains 1) the *Agreement of the conclusion of negotiations between the European Community and the United States of America under Article XXIV:6*, 2) the *Exchange of letters between the European Community and the United States on a settlement for cereals and rice*, and 3) the *Exchange of letters between the European Community and the United States on rice prices*. The three agreements are preceded by a further exchange of letters, signed on the same day -22 July 1996- by the EC Commission Deputy Director General H. F. Beseler, and the Deputy USTR Jeffrey Lang,

In particular, the first letters exchanged, that concerning cereals and rice ⁽³⁹⁶⁾, do not establish rigid criteria for calculating the EC tariffs on those goods, and thus do not provide a definitive solution. The parties are required to respect a certain conduct, i.e. to "review the functioning of the representative price' system for cereals and rice", and, "if it appears to either party that the functioning of the system is materially impeding trade flows between the parties", the EC Commission and the US Government are to enter into consultations and "promptly examine the problems identified with a view to implementing appropriate solutions" ⁽³⁹⁷⁾. A precise obligation was undertaken only with regard to rice: the EC Commission accepted to develop, in consultation with the United States Government, "a cumulative recovery system for husked (brown) rice", to be introduced "on a trial basis" ⁽³⁹⁸⁾.

Of course, as a consequence of the obligations undertaken by the EC, the US announced that it would "withdraw its current request (November 1995) for the establishment of a WTO dispute settlement panel on the European Community's import regime for rice and cereals", and that it would not "reintroduce such request,

containing a "joint understanding" on how Annex (a) of the first Agreement was to be interpreted. We thank Kathryn Maissen, from the WTO Secretariat, for having provided us with a full text of the Agreement notified to the WTO.

The Council of the European Union had already adopted the three Agreements in December 1995 (see Council decision of 22 December 1995 No. 95/591/EC concerning the conclusion of the results of negotiations with certain third countries under GATT Article XXIV:6 and other related matters (United States and Canada), in *OJEC* L334/25 of 30 December 1995). The implementing decision of the EU Council does not contain the subsequent exchange of letters with the "joint understanding" notified on 22 July 1996 to the WTO Secretariat by the EC Commission and the USTR.

(396) We will expose in the text only this arrangement, since there was no subsequent dispute on the correct implementation of the second exchange of letters, a very technical settlement on import duties on rice.

(397) *Exchange of letters between the European Community and the United States on a settlement for cereals and rice*, paragraph 1. In the following paragraph, the EC and the US agreed, in order to evaluate properly the trade flows, to "share all relevant data" so as "to ensure transparency and facilitate appropriate solutions to problems raised."

(398) *Exchange of letters between the European Community and the United States on a settlement for cereals and rice*, paragraph 1.

provided that there [was] effective implementation of the provisions of this Agreement" (399). Besides these commitments, it has also been reported that the two parties agreed on "a side commitment to establish a system that would permit imports of a limited amount of malting barley at 50 percent or less of the duty that would otherwise be charged" (400).

One year later, the USTR again circulated its request for a panel, also asking that the case be considered as one of urgency in light of the fact that it involved perishable goods, and that the EC had not implemented the obligations undertaken in return for the US' delay for placing its request on the DSB agenda (401). The EC reacted by circulating a communication which underlined that the case had already been resolved by mutual agreement, that the joint notification to the WTO General Director implied also a withdrawal of the request for a panel, and that its implementation could be generally considered as appropriate, since "the fundamental elements of the settlement on cereals and rice are working satisfactorily, and ... any remaining problems are being addressed and are capable of resolution, in discussion or consultation with the United States as appropriate" (402). Thus, the EC stressed the general engagements contemplated in the Exchange of letters concerning the creation of a "constant forum of consultations" between the EC Commission and the US Government on the functioning of the EC price system, where any problem had to be dealt with promptly "with a view to implementing appropriate solutions" (403). On the contrary, it was

(399) *Exchange of letters between the European Community and the United States on a settlement for cereals and rice*, paragraph 4.

(400) See the *USTR Releases 1997 Foreign Trade Barriers Report*, USAT TR 12, of 31 March 1997, reporting the *1997 USTR National Trade Estimate Report on Foreign Trade Barriers*, part on *European Union, EU Implementation of Uruguay Round Grain Tariff Commitments*, at p. 4.

(401) *European Communities-Duties on Imports of Grains*, Request for the Establishment of a Panel by the United States of 21 November 1996, WT/DS13/2/Add.1.

(402) *European Communities-Duties on Imports of Grains*, Communication from the European Communities of 30 November 1996, WT/DS13/3.

(403) *Exchange of letters between the European Community and the United States on a settlement for cereals and rice*, paragraph 1.

clear that the US was now seeking something more concrete. The US did not place its request on the agenda of the subsequent DSB meeting, responding favorably to the EC reassurances presented in discussions held thereafter ⁽⁴⁰⁴⁾. However, the US specified that its commitment to withdraw the request for the establishment of a panel was clearly conditional on the "effective implementation" of all the undertakings that had to be carried out by the EC Commission, a requirement that, according to the US, still had not been realized. The US also expressly stated its "right to reintroduce the request in the event that the Communities continue to fail to implement those commitments" ⁽⁴⁰⁵⁾, a prerogative used twice in the following two months ⁽⁴⁰⁶⁾. The dispute was definitively concluded with the EC's implementation of the regulations establishing a quota of malting barley taxed at 50% of the normal duty ⁽⁴⁰⁷⁾, and its introduction on a trial basis of a cumulative recovery system on import duties on rice ⁽⁴⁰⁸⁾. These EC measures were to become effective conditioned on the US' withdrawal of the request for a panel ⁽⁴⁰⁹⁾, an obligation subsequently met by the American Government ⁽⁴¹⁰⁾.

(404) See the introductory remark to the *DSB Minutes of Meeting* of 3 December 1996, WT/DSB/M/27.

(405) *European Communities-Duties on Imports of Grains*, Communication from the United States of 20 December 1996, WT/DS13/4.

(406) *European Communities-Duties on Imports of Grains*, Request for the establishment of a Panel by the United States of 13 February 1997, WT/DS13/5, and *European Communities-Duties on Imports of Grains*, Request for the establishment of a Panel by the United States of 26 March 1997, WT/DS13/6.

(407) Council Regulation (EC) No. 537/97 of 18 March 1997 opening a Community tariff quota for barley for malting falling within CN code 1003 00, in *OJEC* L83/7 of 25 March 1997, and Commission Regulation (EC) no. 704/97 of 18 April 1997 laying down detailed rules for the application of Council Regulation (EC) no. 537/97 and providing for the partial reimbursement of import duties levied on 30.000 tonnes of barley for malting, in *OJEC* L104/20 of 22 April 1997.

(408) See Commission Regulation (EC) no. 703/97 of 18 April 1997 introducing for a trial period from 1 July 1997 to 30 June 1998 a cumulative recovery system for determining certain import duties on rice and amending Regulation (EC) no. 1503/96 in *OJEC* L104/12 of 22 April 1997.

(409) In fact the final provisions of the EC measures established that they would be effective starting 15 May 1997, provided that the US withdrew its request for a panel by 1 May 1997. See Article 3 of Regulation No. 537/97, Article 2 of Regulation No. 704/97, and Article 13 of Regulation No. 703/97.

(410) *European Communities-Duties on Imports of Grains*, Communication

The second example of conflicting views by interested parties on the proper implementation of the settlement reached in a WTO dispute deals with a settlement which was not notified to the DSB. The matter regarded the implementation by the Philippines of its tariff-rate quotas for pork and poultry. The US argued that the quotas illegitimately hindered trade and were administered inefficiently. It introduced a first request for consultations in April 1997 ⁽⁴¹¹⁾, and then a second almost identical one in October 1997 ⁽⁴¹²⁾. We may wonder why the US chose to file a second request for consultations, instead of circulating a request for a panel or, if it deemed that there were other possibilities of a diplomatic solution to their controversy, of promoting further bilateral meetings with the Philippines. The explanation for the US' unusual choice may be found in the need for a proper identification of the measures questioned by the American Government, since in September 1997 the Philippines had introduced a new act concerning the administration of its tariff-quotas for pork and poultry that, of course, could not possibly have been contemplated in the US request of April 1997 ⁽⁴¹³⁾ and, according to the DSU procedure, had first to be the object of consultations before panel proceedings could begin ⁽⁴¹⁴⁾.

In the Communication presented by the Philippines to the DSB,

from the United States of 30 April 1997, WT/DS13/8, concerning the withdrawal of its panel request.

(411) *Philippines-Measures Affecting Pork and Poultry*, Request for Consultations by the United States of 1 April 1997, WT/DS74/1.

(412) *Philippines-Measures Affecting Pork and Poultry*, Request for Consultations by the United States of 7 October 1997, WT/DS102/1.

(413) Thus, in WT/DS74/1, the US stated that "[t]he measures at issue include Republic Act No. 8178 and Administrative Order No. 9, Series of 1996", while, in WT/DS102/1, it added the new Philippine act that had in the meanwhile become effective: "[t]he measures at issue include Republic Act No. 8178 and Administrative Order No. 9, Series of 1996 *as amended by Administrative Order No. 8, Series of 1997*" (the emphasis is ours).

(414) In this case, the US followed the observations made by its representative at the DSB meeting of 29 March 1995 with regard to the new measure introduced by Malaysia in a moment successive to the request for the establishment of the panel made by Singapore in the case WT/DS1: see *DSB Minutes of Meeting of 29 March 1995*, WT/DSB/M/2, part 3, reported *supra*, para. 9.

the respondent expressed the “regretful circumstances” under which it received the second US’ request ⁽⁴¹⁵⁾. In its notice, the Philippines reported that the new questioned measure had been enacted specifically to settle the previous dispute, subsequent to the first set of meetings held under the WTO in April 1997 with the US and the other interested WTO Members ⁽⁴¹⁶⁾. It was then approved a new Administrative Order, which, according to the Philippines, was the “product of intense consultations not only with the concerned sectors in the Philippines, but also with the United States ... [and] was formulated on the basis of written comments from other Members who joined — and who did not join, but were nonetheless interested in — the consultations.” The respondent also reported that the Administrative Order “was expeditiously implemented in response to the incessant diplomatic representations of the United States”; and, of course, it further remarked that it believed that the new measure “adequately addressed” the US concerns. Thus, the new demands presented by the US after the Administrative Order had been effective for two days ⁽⁴¹⁷⁾ — which even contradicted some previous US indications, promptly inserted in the questioned measure — came as completely unexpected to the Philippines; nor was it given enough time to consider the new US claims, since the US introduced the second request for consultations in a very short time. In addition, the Philippines also denounced the “parallel moves by the United States to stage a review of the Benefits we receive from the Generalized System of Preferences (GSP)”, which

(415) *Philippines-Measures Affecting Pork and Poultry*, Communication from the Philippines of 15 October 1997, WT/DS102/2.

(416) The EC and Canada asked to join the US/Philippines consultations: see *Philippines-Measures Affecting Pork and Poultry*, Request to Join Consultations, Communication from the European Communities of 16 April 1997, WT/DS74/2, *Philippines-Measures Affecting Pork and Poultry*, Request to Join Consultations, Communication from Canada of 17 April 1997, WT/DS74/3, and *Philippines-Measures Affecting Pork and Poultry*, Acceptance by the Philippines of the Request to Join Consultations by the European Communities and Canada of 23 April 1997, WT/DS74/4.

(417) In its Communication the Philippines reported that the additional demands were presented by the US on 24 September 1997: the Administrative Order became effective on 22 September 1997.

could very easily be considered as a sort of countermeasure to the alleged inability of the Philippines to abide by WTO law.

It is evident that if the Philippines had stipulated in written form an arrangement on how to implement the commitments undertaken to conclude the DSU procedures after the first round of consultations, and had notified it to the DSB, there would have been less uncertainty. This is in fact what the Philippines has recently done so as to close the controversy with the US over its administration of tariff-quotas relating to pork and poultry: the Philippines and the US have notified a mutually agreed solution explaining how the Philippines license system is to be simplified and improved ⁽⁴¹⁸⁾.

15. *Positive effects of the notification of WTO mutually agreed solutions for the institutional systems of WTO Members. The case of the EC.*

a) *The qualification of the concept of mutually agreed solution in the light of public international law.*

Respect for the mandatory requirement to notify of mutually agreed solutions automatically demands that WTO Members determine which among their institutions has the competence to conclude and then notify of those agreements. In this regard, the rule of transparency enshrined in Article 3:6 DSU also leads to more clarity in the constitutional procedures of WTO Members for the conclusion of international agreements.

As it is well known, diplomatic means for settling disputes aim at solving an intergovernmental controversy through an agreement between the parties: their positive conclusion means that the disputants have reached a common legal evaluation, in light of the customary and conventional international law which disciplines their relations, on how to consider settled the controversy between them ⁽⁴¹⁹⁾. Our investigation on the functioning of the DSU system

(418) *Philippines-Measures Affecting Pork and Poultry*, Notification of Mutually Agreed Solution of 13 March 1998, WT/DS74/5, WT/DS102/6.

(419) See G. MORELLI, *Nozioni di Diritto Internazionale*, Cedam, Padova,

has revealed that a "positive conclusion" may be a definitive settlement of the case, completely extinguishing the controversy arisen between the parties, or also an interim agreement ⁽⁴²⁰⁾, temporarily suspending the dispute in order to allow the parties to develop those new policies and strategies necessary to achieve a subsequent stable and fully shared solution. While the content of the commitments in a "suspension agreement" to be fulfilled by complainant and respondent may be similar to that of a framework agreement — i. e. both parties agree on certain principles, that will be pursued when drafting legislation or negotiating international treaties —, the content of the agreement which definitively settles a case will usually have the scheme of an offer by the respondent, followed by its acceptance by the complainant ⁽⁴²¹⁾.

The content of the offer may vary. When this is enough to stop

1967, pp. 375 ff. The author, at p. 373, makes a distinction between the direct solution settling a dispute, which is a legal assessment agreed by the parties, and the extinction of a controversy, defined as a fact, consisting in the desistence from the attitude of contestation undertaken by one of the two parties having opposite views. This distinction has also been followed by F. CAPOTORTI *Corso di Diritto Internazionale*, Giuffrè, Milano, 1995, pp. 235 ff. On the agreements settling a dispute see also G. ARANGIO-RUIZ, *Note sugli Accordi risolutivi di controversie nel diritto internazionale*, in *Comunicazioni e studi*, Vol. IV, 1952, pp. 101-114; A. GIARDINA, *Arrangements amiables ed estinzione del processo di fronte alla Corte internazionale di Giustizia*, in *Comunicazioni e studi*, Vol. XIV, 1975, pp. 337-364; G. MORELLI, *Estinzione e soluzione di controversie internazionali*, in *Comunicazioni e studi*, Vol. III, 1950, pp. 54-53.

(420) See the "suspension agreement" reached by the EC and the US in the *Helms-Burton* case, *supra* at para. 4.

(421) The presentation of an offer and its acceptance as two unilateral acts instead of a single bilateral act, i. e. an agreement, is to be firmly rejected: "[p]uò anche accadere, e nel fatto accade assai spesso, che una dichiarazione unilaterale di volontà rappresenti l'accettazione di una precedente proposta rimasta in sospenso, o sia essa medesima una proposta nuova che attende, quando che sia, l'accettazione. Nell'uno e nell'altro caso la dichiarazione di volontà diventa l'elemento costitutivo di un accordo, dal quale, e non dalla dichiarazione unilaterale, derivano gli effetti giuridici di cui si tratta" (it could also happen, and in fact often does, that a unilateral declaration represents the acceptance of a previous proposal which had been left hanging, or a new proposal awaiting acceptance. In both cases, the declaration of intent becomes a constitutive element of an agreement. It is from this agreement, and not from the unilateral declaration, that the legal effects are derived.) D. ANZILOTTI, *Corso di diritto internazionale*, Vol. I, Roma, 1928, p. 310.

violating the WTO system, it may consist in the simple withdrawal of the challenged measure/measures, a withdrawal that may be immediate, or gradual, i. e. to be achieved through a programme of phasing out. Sometimes, however, a simple withdrawal may not be sufficient, since the old rules may need to be substituted with new ones. In this case, the offer will consist in a new act, which will modify in some parts or will completely change the old rules.

The content of the acceptance will be the withdrawal of the complaint that, when implementation of the offer has not already taken place, will be conditioned upon its full execution.

The content of the offer, far from being unilaterally elaborated in complete isolation by the respondent, is the result of an intensive transaction between the disputants, clearly demonstrating the "bargaining context" within which diplomatic solutions are devised and achieved. Therefore, the content of the engagement undertaken by the respondent expresses the legal assessment attained by the two parties on how properly to implement WTO law.

There are then all the elements forming an international agreement ⁽⁴²²⁾, i. e. two or more international subjects who, exercising their public powers, discretionally decide how and which kind of obligations they have to take towards each other with the aim, in the specific case of the GATT/WTO dispute settlement system, to settle a controversy.

One may wonder why the Uruguay Round negotiators chose the neutral expression "mutually agreed solutions" to indicate the agreements directly settling trade disputes between WTO Members. In our opinion, a very convincing explanation for this phenomenon of vague terminology may be found by looking at the WTO Members' various internal provisions establishing the procedures to be followed by their institutions when concluding international agreements. Most are very solemn procedures, to be carried out by the

(422) On this notion see J. KLABBERS, *The Concept of Treaty in International Law*, Kluwer, The Hague, London, Boston, 1996 and the bibliography there quoted. See also *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment of 1 July 1994, 1994, ICJ Rep. 112.

most representative constitutional bodies, very often requiring the full participation of national assemblies; however, they usually do not explicitly state if the head of the branch of the national administration having the power to take the decisions needed to *implement* an international agreement which settles a dispute also has the power to *conclude* that agreement with a foreign country. Very often this lack of detailed rules on the treaty making power of public authorities, other than the president of the State or the head of the government, the Ministry of Foreign Affairs or the national parliaments, has been the reason for secrecy, and for the great fantasy in the naming of international instruments ("Minutes of the meeting", "Political Understanding", "Joint Declaration", "Memorandum", "Understanding", "Arrangement" ⁽⁴²³⁾) so as not to state clearly that what was signed by a high official was intended to be an international agreement, a circumstance requiring that the question of the international powers of national administrations be addressed.

The name chosen by the Uruguay Round negotiators, in line with the linguistic choices of all their predecessors, beginning with those who drafted the GATT 1947 ⁽⁴²⁴⁾, in our opinion reflects the precise intent of avoiding entering into any religious war on the concept of international agreement: the term "mutually agreed solutions" aims at encompassing any legal qualification of a positive diplomatic conclusion made by WTO Members, so as to require its WTO-consistency and its notification. It is a choice perfectly in line not only with the wording used for disciplining the dispute settlement procedures, but also with the choices of terminology made

(423) However, as it is well known, the name of an act cannot change its legal nature: "[t]erminology is not a determinant factor as to the character of an international agreement or undertaking. In the practice of States and of international organizations and in the jurisprudence of international courts, there exists a great variety of usage; there are many different types of acts to which the character of treaty stipulations has been attached." *South West Africa Cases*, Judgment of 21 December 1962, cit., at p. 331.

(424) Article XXII GATT speaks of "satisfactory solution", and Article XXIII GATT of "satisfactory adjustment;" the 1979 *Understanding* (at para. 4) deals with "mutually satisfactory conclusions", while the 1989 *Understanding* (part B) uses the same expression of the DSU, "mutually agreed solutions."

with reference to all the Marrakech Agreements. There, the wording chosen for indicating the measures capable of affecting the functioning of the WTO Agreements has the clear purpose of including any binding instrument which may be of interest for the proper functioning of the Agreement ⁽⁴²⁵⁾.

b) *The EC institutions competent to conclude WTO mutually agreed solutions.*

In our opinion, the WTO discipline of mutually agreed solutions is bringing to the fore very interesting institutional clarifications with regard to the EC institution competent to settle a case before the WTO. These clarifications are susceptible to general application, and thus, are valid also outside the Marrakech context. Within the EC legal system, the institution having the general treaty making power is the EU Council which, after the Single European Act and

(425) A few examples include: Annex B, point 3 of the SPS Agreement, which requires Members to set up enquiry points for the provision of answers or documents regarding "the membership ... of the Member ... in bilateral and multilateral *agreements* and *arrangements* within the scope of this Agreement"; Article 2:3 of the ATC Agreement: "Concerned Members agree to enter into consultations promptly upon request with a view to reaching such mutual *agreement*. Any such *arrangements* shall take into account ..."; Article 11:1 (b) of the Agreement on Safeguards: "... a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. These include actions taken by a single Member as well as actions under *agreements*, *arrangements* and *understandings* entered into by two or more Members"; Article 63:1 TRIPS: "Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published."

We may find the same technique — i.e. a wording capable of being applied to any kind of binding instrument — also in the mutually agreed solutions concluded by WTO Members. For instance, in the settlement concluding the dispute regarding the Indian import restrictions (WT/DS96/8), India and the EC Commission agreed on the fact that "India shall grant to the EC treatment no less favourable than that granted by India to any other country with respect to the elimination or modification of import restrictions on [certain] products ... under any form, either autonomously or pursuant to *agreement* or *understanding* with that country, including pursuant to the *settlement* of any outstanding dispute under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes." Emphasis added.

after the Treaty of Maastricht, needs very often the consultative opinion or, on certain occasions, the positive assent of the European Parliament ⁽⁴²⁶⁾. The Marrakech Agreements, because of their political importance, the wide fields which they cover and the sophisticated institutional system they create, were concluded with the unanimous vote of the Council and the positive assent of the Parliament ⁽⁴²⁷⁾.

However, we have already seen that many mutually agreed solutions have been stipulated by the EC Commission. We will try here to hint very briefly at the rules conferring that power to this EC institution ⁽⁴²⁸⁾, so as to point out under which conditions the treaty

(426) On the external relations of the European Community see, among others, A. DASHWOOD, *The limits of European Community Powers*, in *ELR*, 1996, pp. 113-128; F. DEHOUSSE, K. GHEMAR, *Le traité de Maastricht et les relations extérieures de la Communauté européenne*, in *EJIL*, 1994, pp. 151-172; C. FLAESCH-MOUGIN, *Le traité de Maastricht et les compétences externes de la Communauté européenne: à la recherche d'une politique externe de l'Union*, in *CDE*, 1993, pp. 350-398; G. GAJA, *Restraints Imposed by European Community Law on the Treaty-Making Power of the Member States*, in *Skrifter från Juridiskå Fakulteten i Uppsala*, 65, *Dealing with Integration*, Vol. 2, Iustus Förlag, 1998, pp. 97-117; Id., *Introduzione al diritto comunitario*, Laterza, Roma-Bari, 1996, pp. 135 ff; K. LENAERTS, E. DE SMITTER, *The European Community's Treaty-Making Competence*, in *YEL*, 1996, pp. 1-57; J.V. LOUIS, P. BRÜCKNER, *Relations extérieures*, in J. MEGRET, M. WAELEBROECK, J.V. LOUIS, D. VIGNES J.L. DEWOST, *Le droit de la Communauté économique européenne*, Vol. 12, ULB, Bruxelles, 1980; I. MACLEOD, I.D. HENDRY, S. HYETT, *The External Relations of the European Communities*, Clarendon Press, Oxford, 1996; P. MENGOZZI, *Il diritto comunitario e dell'Unione europea*, Cedam, Padova, 1997, pp. 371 ff; Id., *European Community Law*, Graham and Trotman/N. Nijhoff, London/Dordrecht/Boston, 1992, pp. 251 ff; P. PESCATORE, *External Relations in the Case-law of the Court of Justice of the European Communities*, in *CML Rev.*, 1979, pp. 615-645; E. STEIN, *External Relations of the European Community: Structure and Process*, in *Collected Courses of the Academy of European Law*, Vol. I, Book 1, 1991 pp. 115-188.

(427) See the preamble of Council Decision of 22 December 1994 No. 94/800/EC concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), in *OJEC* L336/1 of 23 December 1994.

(428) For a study on the existence and the limits of a treaty making power of the EC Commission see E. BARONCINI, *L'equilibrio istituzionale comunitario nella conclusione ed applicazione di accordi internazionali*, PhD thesis, University of Bologna, 1998, chapter II.

making power activity of the EC Commission within the GATT/WTO system may be considered perfectly legitimate.

At first glance, the ruling issued by the Court of Justice in the very famous case concerning the competence of the EC Commission to conclude an antitrust cooperation administrative Agreement with the US may be considered as throwing a shadow, even if very light, on the legitimacy of the EC Commission power within the GATT/WTO dispute settlement system ⁽⁴²⁹⁾. In fact, the EC Commission had tried to base its competence to conclude the contested Agreement on its wide practice of administrative arrangements which, combined with the apparently less severe wording reserved to its powers by the french official version of Article 228 ⁽⁴³⁰⁾, could have constituted the proper legal basis for such an international activity. The Court did not accept this argument because "in any event, a mere practice cannot override the provisions of the Treaty" ⁽⁴³¹⁾. In that practice, the EC Commission included also, as it results from the report of the hearing, "les accords (normalement sous forme d'échanges de lettres) mettant fin à des litiges commerciaux au sein du GATT" ⁽⁴³²⁾. These elements could create the impression that the Court would not recognize a treaty making power for the EC

(429) *French Republic v. Commission of the European Communities*, case C-327/91, [1994] ECR I-3641. As it is well known, the Court ruled that the EC Commission was not competent to conclude the Agreement concerning cooperation in the application of the EC and US antitrust laws. On this case see N. BURROWS, *No General External Relations Competence for the Commission*, in *ELR*, 1995, pp. 210-213; E. CANNIZZARO, *Sulla competenza della Commissione CE a concludere accordi internazionali*, in *RDI*, 1992, pp. 657-670; O. CASANOVAS Y LA ROSA, *La competencia de la Comisión para concluir acuerdos internacionales*, in *Revista de instituciones europeas*, 1995, pp. 533-553; A. RILEY, *The Jellyfish Nailed? The Annulment of the EC/US Competition Co-operation Agreement*, in *ECLR*, 1995, pp. 185-196; G. SCHUSTER, *Comment on the judgment C-327/91*, in *AJIL*, 1995, pp. 136-142.

(430) The english version of Article 228:2 ECT reads that "[s]ubject to the powers vested in the Commission in this fields" the agreements are concluded by the Council, while the french version sounds "sous réserve des compétences reconnues à la Commission". Emphasis added.

(431) *French Republic v. Commission of the European Communities*, case C-327/91, cit., para. 36.

(432) Report of the hearing of case C-327/91, para. 74. The EC Commission practice in the GATT 1947 is mentioned by J. BOURGEOIS, *Politique Commerciale*

Commission also with reference to the "practice" of amicable settlements concluding GATT/WTO disputes.

Such an interpretation of the decision of the Court, in our opinion, has to be considered as untenable. In fact, the EC Commission explained in the report of the hearing what it understood as its international treaty making practice, giving concrete examples, while the Court did not dwell upon every single instrument indicated by the defendant. Furthermore, that judgment has to be read together with other important pieces of the case law of the same Court, and of course always in light of the EC institutional system.

Our exposition has to start from the qualification constantly made by the EC Court of Justice with regard to the international agreements concluded by the European Community: the EC judges consider the agreements adopted by the EC as an "integral part" of the Community legal system, i.e. they are EC law ⁽⁴³³⁾.

It follows that, when an EC measure or an EC Member State measure is attacked before the DSU by another WTO Member because of its incompatibility with the Marrakech system, the EC Commission will have the same power that it has with regard to any other piece of EC legislation or of Member State legislation deemed inconsistent with the EC system ⁽⁴³⁴⁾.

If the contested measure has been issued by an EC Member

Commune, in A. BARAV, C. PHILIP, *Dictionnaire Juridique des Communautés européennes*, PUF, Paris, 1993, pp. 769-777, at p. 771.

(433) "The provisions of the agreement, from the coming into force thereof, form an integral part of community law". See *Haegeman*, case 181/73, [1974] ECR 449, para 5, *Kupferberg*, case 104/81, [1982] ECR 3641, para.13, *Demirel*, case 12/86, [1987] ECR 3719, para. 7, *Republic of Greece v. Commission of the European Community*, case 30/88, [1989] ECR 3711, para. 12; *Sevince*, case C-192/89, [1990] ECR I-3461, para. 8.

(434) "The treaty establishing the Community has conferred upon the institutions the power not only of adopting measures applicable in the Community but also of making agreements with non-member countries and international organizations in accordance with the provisions of the treaty. According to Article 228:2 [after the treaty of Maastricht para. 2 has become para. 7] these agreements are binding on the institutions of the Community and on Member States. Consequently, *it is incumbent upon the Community institutions, as well as upon the Members States, to ensure compliance with the obligations arising from such agreements*". *Kupferberg*, case 104/81, cit., para. 11, emphasis added.

State, the EC Commission will exercise its power as guardian of the treaty as established by Article 155 ECT, combined with the clear duty enshrined by Article 228:7 ECT — according to which the agreements concluded by the EC are binding on the EC institutions and on EC Member States — and with Article 169 ECT, conferring on the Commission the tools for enforcing the respect of EC law by its Member States ⁽⁴³⁵⁾. This means that if there is the possibility of a diplomatic settlement to the dispute, the EC Commission has the power to stipulate the mutually agreed solution providing for the way in which a given EC Member State will have to modify its internal laws so as to correctly implement the international treaties adopted by the EC. In case of resistance from the EC Member State, the Commission may use Article 169 ECT proceedings, and eventually bring the case before the EC Court of Justice, which has also the task “within the framework of its jurisdiction over the interpretation of agreements concluded by the Community, to ensure their uniform application throughout its territory” ⁽⁴³⁶⁾.

Of course, when the questioned measure is issued by the EC Commission, on the basis of the powers directly conferred on it by the EC Treaties or by EU Council acts, the Commission has to exercise the discretionary public power it has been given to pursue the general interest of the EC in a manner consistent with EC international commitments: thus, it may correct its normative activity by coordinating it with the complaining party, after having reached a

(435) This construction of the powers of the EC Commission was recently confirmed by the EC Court of Justice. The ECJ, called to clarify the powers of the EC Commission with regard to the implementation by EC Member States of international agreements concluded by the EC, ruled that it is up to the EC Commission to monitor the respect of EC law and thus also of the international agreements concluded by the Community: “[u]nder Article 155 of the EC Treaty, the Commission is responsible for ensuring application of the Treaty and, accordingly, compliance with international agreements concluded by the Community which, pursuant to Article 228 of the Treaty, are binding both on the Community institutions and the Member States” (*EC Commission v. Federal Republic of Germany*, case C-61/94, [1996] ECR I-3989, para. 15).

(436) *EC Commission v. Federal Republic of Germany*, case C-61/94, cit., para. 16. The *Scallops* case, concluded by the EC Commission with regard to a modification of a piece of french legislation infringing WTO duties, is an example of this kind of agreement.

common understanding on the way in which WTO law is to be interpreted and applied. With regard to how the Commission has to draft its acts in this case, we totally share the opinion expressed by the EC Advocate General in the *Corn Gluten Feed* case ⁽⁴³⁷⁾. Therefore, when the EC Commission implements the commitments agreed with a third country it must clearly state the international origin of its act. A lack of adequate explanation of the role played by a third country in the process of definition of the EC will, as well as of the fact that the EC Commission is issuing that particular act so as to comply with an international commitment it has undertaken, cannot possibly be considered as meeting the requirements of transparency and of stating the reasons which must be respected by all the EC legislation, and thus entails the illegitimacy of the act ⁽⁴³⁸⁾.

Finally, when the act deemed to be in violation of the Marrakech system is an act taken by the Council, or by the Council and the European Parliament, the Commission may only negotiate the agreement, which is then to be concluded pursuant to the rules directly established by the EC Treaty articles devoted to the external relations ⁽⁴³⁹⁾.

Turning now to the opposite hypothesis, that of the EC holding the role of complainant, it must be underlined that the EC Treaty has no provision similar to Article 169, i. e. no provision establishing the procedures to be followed by the EC Commission to enforce the respect of treaties by its international partners. We then have to see

(437) *French Republic v. Commission of the European Communities*, case C-267/94, [1995] ECR I-4845.

(438) Conclusions of the Advocate General Colomer in case C-267/94, cit., paras. 29-32.

(439) See the Council decision of 22 December 1995 No. 95/591/EC concerning the conclusion of the results of negotiations with certain third countries under GATT Article XXIV:6 and other related matters (United States and Canada), in OJEC L334/25 of 30 December 1995, issued to adopt the settlement reached with the US to conclude the dispute raised by the Government of Washington in the *European Communities-Duties on Imports of Grains* case (WT/DS13/1), *supra*, para. 14, and the Council decision of 13 May 1996 No. 96/317/EC concerning the conclusion of the results of consultations with Thailand under GATT Article XXIII, in OJEC L122/15 of 22 May 1996, issued to adopt the mutually agreed solution stipulated with Thailand to settle the *European Communities-Duties on Imports of Rice* case (WT/DS17/1), *supra*, para. 13 lett. c).

if there is any clarification on this subject within the EC secondary sources: and there we find Regulation No. 3286/94, establishing the procedures to be followed by the EC institutions to address the complaints of a private party or an EC Member State alleging that a third country has not respected the international commitments undertaken towards the European Community ⁽⁴⁴⁰⁾. Through that act, executive powers of a remarkable relevance have been conferred on the EC Commission. The provisions enabling the Commission with a limited treaty making power are Articles 11 and 13 of Regulation No. 3286/94. On their basis, the Commission, pursuant to the comitology procedure of Article 14 ⁽⁴⁴¹⁾, may suspend the investigation requested by a private party or by a Member State, and terminate the procedure initiated before an international organization if "the third country or countries concerned take(s) measures which are considered satisfactory." As we have seen from the

(440) EC Council Regulation No. 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, in *OJEC* L349/71 of 31 December 1994. On this Regulation see H. BEEKMANN, *The 1994 Revised Commercial Policy Instrument of the European Union*, in *World Competition*, 1995, no. 1, pp. 53-75; M. BRONCKERS, *Private Participation in the Enforcement of WTO Law: The New EC Trade Barriers Regulation* in *CML Rev.*, 1996, pp. 299-318; P.J. KUYPER, *The New WTO Dispute Settlement: The Impact on the European Community*, in *JWT*, 1995, no. 6, pp. 49-72; A. STEWART, *New Aspects to the EU Approach to the Dispute Settlement System - Trade Barriers Regulation*, paper presented at the 2nd Cameron May Annual Conference on Dispute Resolution in the World Trade Organization, Geneva, 30th May 1997. Special thanks to Mauro Petriccione, official at the EC Commission, DG I, for the information given on the drafting and functioning of Regulation No. 3286/94. The author assumes full responsibility for any eventual misrepresentation of this EC act.

(441) When the Commission has to take a decision under Regulation No. 3286/94, it must first submit the draft to the Committee formed by that Regulation, composed by the representatives of the Members States and chaired by a representative of the Commission. The decision may be applied if after 10 days from the presentation of its proposal no Member States has referred the matter to the EU Council. Should such a referral take place, "[t]he Council may ... acting by a qualified majority revise the Commission's decision" (Article 14, para. 4). However, if the Council has not given a ruling within 30 days from the day on which the matter was referred to it "[t]he Commission's decision shall apply" (Article 14, para. 5).

analysis of the mutually agreed solutions within the WTO framework, this is the classic scheme of a diplomatic solution in a "rule-oriented" context like the WTO: the disputants convene on how the violating country should address and correct its violation; they agree on the time-frame for its implementation, on its modalities, and on the interpretation of the understanding that has been reached; and then, the complainant withdraws its investigation procedures or, if already before an international organization, its request to initiate dispute settlement proceedings. Thus, Regulation 3286/94 grants the EC Commission the power — to be exercised according the above mentioned comitology procedure — to conclude a mutually agreed solution when an investigation is formally requested by a private party or by an EC Member State according to its procedure. Article 11:3 indicates the limit to the treaty making power of the EC Commission: "[w]here, either after an examination procedure, or at any time before, during and after an international dispute settlement procedure, it appears that the most appropriate means to resolve a dispute arising from an obstacle to trade is the conclusion of an agreement with the third country or countries concerned, which may change the *substantive rights* of the Community and of the third country or countries concerned, the procedure shall be suspended according to the provisions of Article 14, and negotiations shall be carried out according to the provisions of Article 113 of the Treaty" (442). In our opinion, this means that the EC Commission has been conferred with the power to conclude mutually agreed solutions where its counterpart undertakes to modify its legislation to fulfill the WTO obligations previously undertaken: that modification of legislation may not possibly be considered a change of "the substantive rights ... of the third country", since a non-WTO consistent measure is not a *right*, but a *violation* of the Marrakech system, that the respondent must change if it wishes to avoid its international responsibility. The limit expressed by Article 11:3 of Regulation 3286/94 is therefore the following one: when, after ascertaining during DSU consultations its impossibility of compliance with WTO law, the respondent pro-

(442) Emphasis added.

poses to reconsider its WTO commitments according to, for instance, Article XXVIII GATT 1994 or Article XXI GATS, so as to change a concession on its schedules, or, more generally, the respondent's proposal may entail a modification of the equilibrium of the arrangements previously accepted by the EC, the Commission may only negotiate that agreement, which will then have to be concluded on behalf of the EC by the EU Council pursuant to Article 113 ECT.

However, the Regulation No. 3286/94 procedures are not those most frequently used by the EC to file a case before the WTO ⁽⁴⁴³⁾. The most common procedure is that constituted by a very strict cooperation between the EC Commission and the 113 Committee, the Council Committee contemplated by Article 113 ECT (the provision devoted to the common commercial policy) and composed by representatives of the EC Member States, whose chairman is the representative of the State holding the semestral presidency of the European Union ⁽⁴⁴⁴⁾. The Commission — 113 Committee coop-

(443) As of 24 June 1998, the EC Commission had brought two cases before the WTO DSU under the Regulation 3286/94 procedures: the *United States-Measures Affecting Textiles and Apparel Products* case, WT/DS85, that has already been settled (cfr. *supra*, para. 9), and *United States-Anti-Dumping Act of 1916*, Request for Consultations from the European Communities of 4 June 1998, WT/DS136/1, filed by the EC Commission after having taken the decision of 16 April 1998 under the provisions of Council Regulation (EC) No. 3286/94 of 22 December 1994 concerning the failure of the United States of America to repeal its Antidumping Act of 1916, No. 98/277, in OJEC L 126/36 of 28 April 1998. The EC Commission also announced that it will start DSU proceedings against Japan because of its import licensing system of leather products and of the subsidies granted to the Japanese leather industry: see EC Commission decision of 19 May 1998 adopted pursuant to Council Regulation (EC) No. 3286/94 concerning obstacles to trade represented by Japanese practices in respect of imports of leather, No. 98/354, in OJEC L159/65 of 3 June 1998.

(444) The EC Commission-113 Committee procedure was followed to file and then settle the following cases: *Japan-Measures Affecting the Purchase of Telecommunications Equipment*, WT/DS15; *United States-Tariff Increases on Products from the European Communities*, WT/DS39; *Japan-Measures Concerning Sound Recordings*, WT/DS42; *Japan-Procurement of a Navigation Satellite*, WT/DS73; *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS96; it was used also for the suspension agreement in the Helms-Burton case (*United States-The Cuban Liberty and Democratic Solidarity Act*, WT/DS38). It has always been the EC Commission to agree with Japan the

eration reveals the political value that the decision to challenge a State before the WTO always entails. Nevertheless, this EC Commission — 113 Committee collaboration to bring a case before the WTO has never been codified. The only legislative reference we may find is in the preamble and in Article 15:1 of Regulation No. 3286/94.

The preamble states that the right of Member States to resort to the new mechanisms “should be without prejudice to their possibility to raise the same or similar matters through other existing Community procedures, and in particular before the Committee established by Article 113;” Article 15 confirms the coexistence of procedures, saying that Regulation No. 3286/94 “shall be without prejudice to ... Community procedures for dealing with matters concerning obstacles to trade raised by Member States in the Committee established by Article 113 of the Treaty”. These “procedures”, called upon but not described in the regulation ⁽⁴⁴⁵⁾, consist in the communication by the EC Commission to the Members of the 113 Committee, before their joint meeting, of its “intention” to proceed to formal WTO consultations with a given WTO Member on a particular topic; or, conversely, it is an EC Member State that places its request to consider the filing of a WTO complaint on the agenda for the next meeting. The 113 Committee as well as the EC Commission always look for *consensus*, turning to a qualified majority vote by the representatives of the EC Member States on the

settlement for the implementation of the recommendations adopted by the DSB subsequently to the panel and appellate reports in their dispute on Japanese tax system of foreign alcoholic beverages: see *Japan-Taxes on Alcoholic Beverages*, Mutually Acceptable Solution on Modalities for Implementation of 15 July 1997, WT/DS8/17 and *Japan-Taxes on Alcoholic Beverages*, Mutually Acceptable Solution on Modalities for Implementation of 12 January 1998, WT/DS8/17/Add.1, WT/DS10/17/Add.1, WT/DS11/15/Add.1.

(445) The EC Commission-113 Committee mechanism has been reconstructed thanks to the interviews with Sandro Fanella, Member of the Deputee 113 Committee, Lucio Gussetti, Member of the Legal Service of the EC Commission, Ramon Torrent, former Director at the Legal Service of the EU Council, Jürgen Huber and Antonio Tanca, Members of the Legal Service of the EU Council, Marisa Arban, Bruno Julien-Malvy, Sandro Paolicchi and Antonio Parenti, Officials of the EC Commission, DGI. The author assumes full responsibility for any eventual misrepresentation of this mechanism.

proposals made by the Commission only if *consensus* is not achievable⁽⁴⁴⁶⁾. The same procedure is followed with regard to mutually agreed solutions. With respect to possible limits to the EC Commission treaty making power within the 113 Committee procedure, we think that the same limit already discussed with regard to the procedures established by Regulation 3286/94 may be applied: it expresses the general principle of applying, for the modification of a rule, the same procedures used for its adoption, unless the rule itself contemplates a different decisional mechanism to be applied to its modification.

The analysis of the EC practice in the diplomatic phase of the WTO dispute settlement mechanism further reveals how the EC and its Member States have implemented the duty of cooperation firmly affirmed by the Court of Justice "where .. the subject-matter of an agreement or a convention falls in part within the competence of the Community and in part within that of the Member States"⁽⁴⁴⁷⁾.

(446) It is not entirely clear if and to what extent Regulation No. 3286/94, through the very simple references it makes to the 113 Committee-EC Commission cooperation, could confer to the 113 Committee a binding power. With regard to the case when the EC is a respondent — i. e. when it is alleged that the EC or its Member States have violated an international obligation — the Court of Justice has unequivocally stated that the role of that Committee "is purely advisory", since "[i]t is clear from the wording of the second subparagraph of Article 113:3 that the Article 113 Committee's task is to assist the Commission in negotiating tariff and trade agreements" (*EC Commission v. Federal Republic of Germany*, case C-61/94, cit., para. 14). The legislative technique adopted by Regulation No. 3286/94 may not be sufficient to overcome the function of "assistance" that Article 113 ECT has conferred to the 113 Committee.

(447) *Opinion 1/94* [1994] ECR I-5267, para. 108. On this opinion, as well as on the relationships between the EC and the WTO see, among others, A. APPELLA, *Constitutional Aspects of Opinion 1/94 of the ECJ concerning the WTO Agreement*, in ICLQ, 1996, pp. 440-462; A. ARNULL, *The Scope of the Common Commercial Policy: a Coda on Opinion 1/94*, in N. EMILIOU, D. O'KEEFFE, (eds.), *The European Union and World Trade Law After the GATT Uruguay Round*, John Wiley & Sons, Chichester, 1996, pp. 343-360; J. AUVRET-FINCK, *Avis 1/94*, in RTDE, 1995, pp. 322-336; J.H.J. BOURGEOIS, *The EC in the WTO and Advisory Opinion 1/94: an Echternach Procession*, in CML Rev., 1995, pp. 763-787; J. DUTHEIL DE LA ROCHÈRE, *L'ère des compétences partagés-À propos de l'étendue des compétences extérieures de la Communauté européenne*, in RMCUE, 1995, pp. 461-470; N. EMILIOU, *The death of exclusive competence?*, in ELR, 1996, p. 294 ss; M. HILF, *The ECJ's Opinion on the WTO- No Surprise, but Wise?*, in EJIL, 1995, pp. 245-259; J.C.

The "forum" for complying with the duty of cooperation in case of mixed competence is provided by the EC Commission — 113 Committee concert. When the legal basis of a complaint that the Commission and/or one or more EC Member States intend to raise before the WTO falls into the joint competence of the EC and its Member States, the request for consultations is now made by the Permanent Delegation of the European Commission to the WTO on behalf of the EC and the EC Member States ⁽⁴⁴⁸⁾, and the same

PIRIS, R. TORRENT, R., *Les problèmes juridiques posés à la Communauté européenne par la conclusion des accords de Marrakech*, in *La Réorganisation Mondiale des Echanges (Problèmes Juridiques)*, cit., pp. 251-271; J.R. SCHMERTZ, *Comment on opinion 1/94*, in *AJIL*, 1995, pp. 772-788; G. TESAURO, *I rapporti tra la Comunità europea e l'OMC*, in *Scritti in onore di Giuseppe Federico Mancini*, Vol. II, *Diritto dell'Unione europea*, Giuffrè, Milano, 1998, pp. 951-994; C.W.A. TIMMERMAN, *L'Uruguay Round: sa mise en oeuvre par la Communauté européenne*, in *RMUE*, 4/1994, pp. 175-180; G. TOGNAZZI, *Il parere 1/94: nuovi sviluppi in tema di relazioni esterne della Comunità europea*, in *DCSI*, 1996, pp. 73-86; T. TRIDIMAS, P. ECKOUT, *The External Competence of the Community and the Case-Law of the Court of Justice: Principle versus Pragmatism*, in *YEL*, 1994, pp. 143-177; M. VELLANO, *La Comunità europea e i suoi Stati membri dinanzi al sistema di risoluzione delle controversie dell'Organizzazione Mondiale del Commercio: alcune questioni da risolvere*, in *Comunità internazionale*, 1996, pp. 499-527; M. VEREECKEN, *La competenza della Comunità a concludere accordi internazionali in materia di servizi*, in *DCSI*, 1996, pp. 86 ff. With particular reference to the duty of cooperation see J. HELISKOSKI, *The "Duty of Cooperation" between the European Community and Its Member States Within the World Trade Organization*, in *The Finnish Yearbook of International Law*, 1996, pp. 59-133.

(448) The first two offensive requests for consultations falling into EC-Member States joined competence (*United States-The Cuban Liberty and Democratic Solidarity Act*, Request for consultations by the European Communities of 3 May 1996, WT/DS38/1 and *Japan-Measures Concerning Sound Recordings*, Request for Consultations by the European Communities of 24 May 1996, WT/DS42/1) were also communicated to the Permanent Mission of the US and to the DSB "from the Permanent Delegation of the European Commission and the Permanent Mission of Italy for the Council of the European Communities", i.e. from the EC Member State holding the presidency of the European Union in that Semester. In the subsequent disputes regarding mixed competence the request for consultations has been notified only by the EC Commission, which specifies in the text that it acts "on behalf on the European Communities and their Member States" (*Canada-Patent Protection of Pharmaceutical Products*, Request for Consultations by the European Communities of 19 December 1997, WT/DS114/1) or upon their instruction (*Canada-Measures Affecting Film Distribution Services*, Request for Consultations by the European Communities of 20 January 1998, W/DS117/1).

However, the request for the establishment of a panel of 4 October 1996 in the

formula is applied to the conclusion of a mutually agreed solution (449).

When the political implications of a case are very sensitive, decisions to suspend or settle a dispute are confirmed at a higher level, by the EU Council. The intervention of the EC institution representing the Member States has taken place in the *Helms-Burton* case. In that controversy, the request for consultations was made by the EC Commission and the EC Member States (450), but then, after the EC Commission achieved a "suspension agreement" with the US, the EU Council intervened to communicate that it also agreed to the suspension of the WTO panel proceedings (451). It was then the COREPER (Committee of Permanent Representatives), not any more the EC Commission, who represented the EU in the negotiations held with the US in October 1997 to monitor progress in the implementation of that agreement (452).

case *United States-The Cuban Liberty and Democratic Solidarity Act*, of 3 May 1996, WT/DS38/2 was communicated only by the Permanent Delegation of the European Communities, and from the text of the request it results that the panel is asked for only by the EC: "[p]ursuant to Article XXIII of GATT 1994, Article XXIII of GATS, and Articles 4 and 6 of the DSU, the EC hereby requests that a panel be established" (emphasis added).

(449) The mutually agreed solution of 17 November 1997 in the case *Japan-Measures Concerning Sound Recordings*, WT/DS42/4 was notified by the Permanent Delegation of the European Commission. Its text states that the agreement was reached between "[t]he European Community and its Member States" on one side and Japan on the other.

(450) See footnote 448.

(451) "Given the Understanding reached between the Commission and the US and the commitments undertaken in it by the US, the Council agreed that the current WTO panel proceedings in respect of the *Helms-Burton* (Libertad) legislation will now be suspended and that, if action is taken against EU companies or individuals under the Libertad Act or under the Iran and Libia Sanctions Act (ILSA), or waivers as described in the Understanding are not granted, or are withdrawn, the Commission will request the WTO to restart, or to re-establish, the panel, which will then follow its natural course. The Council further requests the Commission to keep it informed of any development of the situation." See the official Press Release of the EU Presidency (*Helms-Burton and D'Amato: Council Conclusions*, PRES/97/110 of 21 April 1997) which also reports that the Council determinations were adopted by written procedure. Emphasis added.

(452) See *supra*, para. 4. The suspension of the WTO panel set up for the *Helms Burton* case expired on April 1998, with no definitive settlement between

Turning now to the hypothesis in which the EC or an EC Member State plays the role of respondent under the DSU rules, there have been cases where the complainant — always the US — has addressed its requests for consultations to the single EC Member States ⁽⁴⁵³⁾, obviously deeming that they still retained competence on some part of the allegedly violated WTO Agreements. In such a case, the EC Member State is assisted during the consultations by the EC Commission so as to guarantee a uniform application and interpretation of WTO law within the European Community, but then the mutually agreed solution is concluded by the EC Member State ⁽⁴⁵⁴⁾. However, the choice of addressing a claim to a single EC Member State may be only temporarily correct. In fact, as expressly stated by the EC Court of Justice, when competence is “shared between the Community and its Member States” ⁽⁴⁵⁵⁾, the boundary between the EC competence and that of its Member States in the external relations is a moving one. The judges of Luxembourg affirmed that “[o]nly in so far as common rules have been established at internal level does the external competence of the Community become exclusive”, meaning that “whenever the Community has included in its internal legislative

the US and the EU. Therefore, if the EU intends to react to the US extraterritorial legislation it has to file again a request for consultations. However, during the EU-US Summit held in London on 18 May 1998 it was reported that negotiators were very near to an agreement “on disciplines relating to investments in illegally expropriated property and on principles regarding the use of sanctions.” See *US Extraterritorial Legislation, Press Background Brief 1-EU-US Summit*, London 18 May 1998 and *Trade Issues, Press Background Brief 1-EU-US Summit*, London 18 May 1998, in <http://europa.eu.int/comm/dg01/usbrief1> [or 2].htm.

(453) See *Portugal-Patent Protection Under the Industrial Property Act*, Request for Consultations by the United States of 30 April 1996, WT/DS37/1; *Belgium-Measures Affecting Commercial Telephone Directory Services*, Request for Consultations by the United States of 13 May 1997, WT/DS80/1; *Denmark-Measures Affecting the Enforcement of Intellectual Property Rights*, Request for Consultations by the United States of 21 May 1997, WT/DS83/1; *Sweden-Measures Affecting the Enforcement of Intellectual Property Rights*, Request for Consultations by the United States of 2 June 1997, WT/DS86/1.

(454) See the *Portugal-Patent Protection Under the Industrial Property Act* case (WT/DS37/2), *supra*, para. 13 lett. a).

(455) It has been in this way that the EC Court of Justice has qualified the competence to conclude GATS. See *Opinion 1/94*, cit., para. 98.

acts provisions relating to the treatment of nationals of non-Member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the sphere covered by those acts", and that "[t]he same applies in any event, even in the absence of any express provision authorizing its institutions to negotiate with non-member countries, where the Community has achieved complete harmonization of the rules governing access to a self-employed activity, because the common rules thus adopted could be affected within the meaning of the AETR judgment if the Member States retained freedom to negotiate with non-member countries" ⁽⁴⁵⁶⁾. It could then happen that, during DSU proceedings, the EC, with regard to subject-matters on which it has internal competence, enacts new legislation which expressly confers external competence on its institutions or completes the EC harmonization of the rules governing a certain topic. It is also possible that the interpretation of the proper scope of an EC act previously issued may change because of a ruling by the EC Court of Justice or a different view of the EC institutions. It is no surprise then the decision of the US that, after having filed a request for consultations with Ireland on the consistency of the Irish law granting copyright and neighbouring rights with the TRIPS Agreement ⁽⁴⁵⁷⁾ raised the same issues under the same legal basis with the EC ⁽⁴⁵⁸⁾, and subsequently requested a panel in both

(456) *Opinion 1/94*, cit., at paras. 77, 95 and 96, devoted to defining the EC treaty making power with regard to the GATS Agreement. The Court stated the same concept also with regard to the TRIPS Agreement, at paras. 104 and 105: "The Community is certainly competent to harmonize national rules on [TRIPS] matters, in so far as, in the words of Article 100 of the Treaty, they 'directly affect the establishment or functioning of the common market.' But the fact remains that the Community institutions have not hitherto exercised their powers in the field of the enforcement of intellectual property rights, except in Regulation No. 3842/86 ... laying down measures to prohibit the release for free circulation of counterfeit goods. It follows that the Community and its Member States are jointly competent to conclude TRIPs."

(457) *Ireland-Measures Affecting the Grant of Copyright and Neighbouring Rights*, Request for Consultations by the United States of 22 May 1997, WT/DS82/1.

(458) *European Communities-Measures Affecting the Grant of Copyright and Neighbouring Rights*, Request for Consultations by the United States of 6 January 1998, WT/DS115/1.

cases ⁽⁴⁵⁹⁾, so as to be sure that the benefits it alleges to enjoy from membership in the WTO system may be fully recognized by the panels, without running the risk to address its complaint towards the WTO Member who cannot be considered as having undertaken towards the US the commitments the American Government is claiming. This technique of filing identical complaints against both the EC and EC Member States has been applied also with regard to the *Enforcement of intellectual property rights for motion pictures and television programs* cases, where the US raised the same issues against the EC ⁽⁴⁶⁰⁾ as well as Greece ⁽⁴⁶¹⁾.

So far, the EC and its Member States have not been able to agree on anything more than a double-headed representations within the WTO, although the EC Court of Justice has ruled with regard to "shared competence" "*the requirement of unity in the international representation of the Community*" "both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into" ⁽⁴⁶²⁾. Failure to comply adequately with this decision may entail serious consequences for the EC system. A panel as well as the Appellate Body may be asked by a complainant to establish who, between the EC and its Member States, is responsible for non-compliance with WTO obligations. If the third-party bodies

(459) *Ireland-Measures Affecting the Grant of Copyright and Neighbouring Rights*, Request for the Establishment of a Panel by the United States of 9 January 1998, WT/DS82/2; *European Communities-Measures Affecting the Grant of Copyright and Neighbouring Rights*, Request for the Establishment of a Panel by the United States of 9 January 1998, WT/DS115/2. It must be stressed here that only three days passed between the request for consultations with the EC and that for a panel because claimant and respondent "*jointly considered* that, for the purposes of the last sentence of Article 4.7 of the DSU, the consultations had failed to settle the dispute" (see WT/DS115/2, p. 2, emphasis added). We remind that, pursuant to Article 4:7 DSU, "the complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute."

(460) *European Communities-Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, Request for Consultations by the United States of 30 April 1998, WT/DS124/1.

(461) *Greece-Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, Request for Consultations by the United States of 4 May 1998, WT/DS125/1.

(462) *Opinion* 1/94, cit., para. 108, emphasis added.

agree to address such a question, it will mean a WTO ruling on the EC/Member States division of competence in external relations, one of the most sensitive EC institutional issues. Moreover, the intervention of WTO panels and of the Appellate Body may be requested with reference not only to issues falling into EC / EC Member States joint competence, but also with regard to those WTO agreements which are undisputedly considered as being of exclusive competence of the EC.

This indeed is what already happened in the case *European Communities — Customs Classification of Certain Computer Equipment* ⁽⁴⁶³⁾ with regard to the GATT 1994, an agreement clearly within the exclusive competence of the European Community. In this case, the US first requested consultations with the EC ⁽⁴⁶⁴⁾ complaining that a tariff reclassification made by the customs authorities of the EC and their Member States (the United Kingdom and Ireland in particular) of Local Area Network (LAN) equipment and personal computers (PCs) with multimedia capability infringed Article II GATT 1994 and nullified or impaired the value of the concession accruing to the US under the GATT 1994. The US argued that as a consequence of being told during the consultations with the EC “that there was no centralized EC customs authority and that the Community could not control the classification practices of member State customs authorities”, it was “forced ⁽⁴⁶⁵⁾ to ask for consultations and establishment of a panel [also] with respect to Ireland and the United Kingdom.” The US then concluded

(463) *European Communities-Customs Classification of Certain Computer Equipment*, Report of the Panel of 5 February 1998, WT/DS62/R.

(464) *European Communities-Customs Classification of Certain Computer Equipment*, Request for Consultations by the United States of 8 November 1996, WT/DS62/1.

(465) WT/DS62/R, para. 4.12. See *United Kingdom-Customs Classification of Certain Computer Equipment*, Request for Consultations by the United States of 14 February 1997, WT/DS67/1; *Ireland -Customs Classification of Certain Computer Equipment*, Request for Consultations by the United States of 14 February 1997, WT/DS68/1; *United Kingdom-Customs Classification of Certain Computer Equipment*, Request for the Establishment of a Panel by the United States of 7 March 1997, WT/DS67/3; *Ireland-Customs Classification of Certain Computer Equipment*, Request for the Establishment of a Panel by the United States of 7 March 1997, WT/DS68/2.

the presentation of its claims before the panel by requesting it to specify who, between the EC and Ireland and the UK, was responsible for the infringement of its WTO benefits ⁽⁴⁶⁶⁾.

Of course, the EC strongly objected to this claim, asking the panel "to reject the US claims against Ireland and the United Kingdom", since "[a]s these Member States had not engaged in any tariff binding vis-à-vis the United States or any other country, they could not be considered to have violated any obligations under GATT Article II" ⁽⁴⁶⁷⁾. The Community showed that beginning in the late 1950s there had been a progressive transfer of sovereignty in GATT matters, and it underlined the fact that the 1994 EC schedule of tariff concessions was undertaken only by the EC, and thus was bound exclusively at the level of the EC ⁽⁴⁶⁸⁾. The US countered that the transfer of sovereignty from the EC Member States to the EC regarded only "the internal legal framework of the Communities", and that it was not that framework to be at issue in the dispute; on the contrary, the issue was the identification of the subjects towards whom the US was to enforce "the benefit of the bargain it had struck at the Uruguay Round" ⁽⁴⁶⁹⁾.

As noted in the transcripts of the panel proceedings "[t]he European Communities disagreed with the US allegation that the transfer of sovereignty between EC member States and the EC was irrelevant on the external plane. The EC had bound a tariff schedule of its own in GATT 1994 and was an original Member of the WTO. This indicated that *the transfer of sovereignty had been recognized by Members*, and that the EC was more than a simple customs union. *The EC was ready to assume its international obligations, but was not ready to allow an attack on its constitution in the WTO*" ⁽⁴⁷⁰⁾.

The Panel did not find itself incompetent to address such a claim but, since "what [was] at issue in [that] dispute [was] tariff treat-

(466) WT/DS62/R, para. 3.2.

(467) WT/DS62/R, para. 3.3.

(468) WT/DS62/R, para. 4.10.

(469) WT/DS62/R, para. 4.14.

(470) WT/DS62/R, para. 4.15, emphasis added.

ment of LAN equipment and multimedia PCs by customs authorities in the European Communities", it decided to "revert to this issue in light of the conclusions of that examination" (471). The Panel concluded by finding that "the European Communities ... acted inconsistently with the requirements of Article II of GATT 1994" (472), and thus implicitly stated that the EC was the WTO Member responsible towards the US.

Another similar thorny question could arise for the EC and its Member States should the US decide to request a panel for the WTO cases it has started against Belgium, the Netherlands, Greece, Ireland and France regarding their income tax systems, which allegedly allow exemptions for the export activity of their national economic operators (473). According to the American Government, such exemptions are inconsistent with Article 3 of the WTO Agreement on Subsidies and Countervailing Measures (SCM). However, the SCM Agreement falls within the EC's exclusive competence (474): it is

(471) WT/DS62/R, para. 8.16.

(472) WT/DS62/R, para. 9.1.

(473) See *Belgium-Certain Income Tax Measures Constituting Subsidies*, Request for Consultations by the United States of 5 May 1998, WT/DS127/1; *Netherlands - Certain Income Tax Measures Constituting Subsidies*, Request for Consultations by the United States of 5 May 1998, WT/DS128/1; *Greece-Certain Income Tax Measures Constituting Subsidies*, Request for Consultations by the United States of 5 May 1998, WT/DS129/1; *Ireland-Certain Income Tax Measures Constituting Subsidies*, Request for Consultations by the United States of 5 May 1998, WT/DS130/1; and *France-Certain Income Tax Measures Constituting Subsidies*, Request for Consultations by the United States of 5 May 1998, WT/DS131/1. See *United States Launches WTO Cases Against European Income Tax Subsidies*, USTR Press Release No. 98/47 of 6 May 1998.

(474) All the parties which have submitted observations to the EC Court of Justice on the occasion of *Opinion 1/94* (i.e. the EC Commission, the EU Council, the European Parliament and 8 EC Member States) agreed that the SCM Agreement together with GATT 1994, the Agreement on Textiles and Clothing, the Agreement on Trade-Related Investment Measures, the Agreement on Implementation of Article VI of the GATT 1994, the Agreement on Implementation of Article VII of the GATT 1994, the Agreement on Preshipment Inspection, the Agreement on Rules of Origin, the Agreement on Import Licensing Procedures and the Agreement on Safeguards — thus the great majority of the WTO Multilateral Agreements on Trade in Goods — fall into the EC's exclusive competence to conclude international agreements on the basis of Article 113 ECT. The EC Court of Justice ruled that also the remaining WTO Agreements on trade in goods are

easy to predict the difficulties that those requests for consultations must have already caused and will cause to the EC and its Member States, that once more will have to face interference in such delicate "constitutional" issues as the implementation of international agreements and their joint participation into complex multilateral systems like the WTO ⁽⁴⁷⁵⁾.

16. *Conclusions: more than a rich diplomatic balance for the DSU.*

The analysis of the practice of the WTO settlement mechanism reveals its great capacity as "catalyst" ⁽⁴⁷⁶⁾ for dispute resolutions, and so that it fulfils its role "as a deterrent against conflict and a promoter of agreement" ⁽⁴⁷⁷⁾. Its two-track possibility has fostered a new "rule oriented" equilibrium, due first to the fact that if a negotiated settlement is not possible the jurisdictional track will be unavoidable, and second to the fact that there is multilateral monitoring of the consistency with the Marrakech system of the settlements reached within the WTO. Besides the great number of settled

within the EC's exclusive common commercial policy competence, thus rejecting the arguments of those who maintained that the Agreement on Agriculture and the Agreement on the Application of Sanitary and Phytosanitary Measures had to be based also on Article 43 ECT and that the Agreement on Technical Barriers to Trade required the joint participation of the EC and its Member States for its conclusion. See *Opinion* 1/94, cit., paras. 22-34.

(475) It has to be underlined here the entirely different behaviour of Canada, that when an EC Member State's measure or practice is inconsistent with a WTO Agreement falling into the EC exclusive competence has always requested consultations with the EC and not the EC Member State. See the *Scallops* case, *supra*, at para. 11, and *European Communities-Measures Affecting Asbestos and Products Containing Asbestos*, Request for Consultations by Canada of 28 May 1998, WT/DS135/1, where the North-American Government questions the consistency of a 1996 French Decree prohibiting trade of asbestos and products containing asbestos with the SPS Agreement (Articles 2, 3 and 5), the TBT Agreement (Article 2) and the GATT 1994 (Articles III, XI and XXIII).

(476) This term for the WTO dispute settlement system was used by WTO Director-General Renato Ruggiero when commenting the part played by the DSU in the conclusion of the US/Japan Automotive Agreement. See *WTO Focus Newsletter*, May-June 1995, No. 3, p. 2.

(477) From the *Summary Conclusions* of the 1996 *Annual Report of the Dispute Settlement Body* of 28 October 1996, WT/DSB/8, written with regard to the positive diplomatic settlement of WTO matters of that year.

cases recorded in more than three years of WTO life ⁽⁴⁷⁸⁾, another very interesting example of the new equilibrium in trade relations promoted by the DSU may be found in the self-restraint adopted by the US administration in the implementation of unilateral measures based on its Section 301 without a former examination from the DSB ⁽⁴⁷⁹⁾. We have also seen how cooperation is fostered in trade matters among WTO Members, who are seriously committed to identifying obstacles to trade at their very instance and smoothing any controversy regarding their trade relations.

Moreover, the nature and the effectiveness of the WTO DSU have very interesting implications for how officials of the WTO Members administer WTO matters. We have been acquainted with the importance attributed to statements of WTO Member representatives before WTO Bodies, especially to the behaviour observed during DSU consultations. The two stages of the WTO dispute settlement mechanism, diplomatic and judicial, entail that the intervention of a third-party body endowed with the power to issue binding decisions is legitimate only with regard to matters previously and adequately dealt with during consultations which failed after the required period of time. No party to a dispute may be deprived of its right to fully explore the possibility of reaching an amicable solution — which usually is also the promptest, most certain and least costly means of settling the issue. There is no place for improvisation or unclear situations within the WTO. Its membership, on the contrary, demands for accuracy, careful consideration, professional skill and clarity when expressing national positions. A full awareness of the consequences that every statement may have is all the more necessary in a system endowed with a dispute settlement mechanism whose third-party bodies make every effort to demonstrate their independence and the strength of the principles of the Marrakech system. This last point is illustrated by

(478) As of 24 June 1998, the WTO had recorded 28 settled or inactive cases, more than the double of the number of the controversies that underwent all the DSU stages (12).

(479) See *supra* the US/Japan automotive case (at para. 7 lett. b)) and that on the 1987 Presidential Proclamation issued by the US in response to the EC Directive banning hormones treated beef (at para. 13 lett. c)).

what happened after the EC's rash declaration during the consultations with the US in the *European Communities — Customs Classification of Certain Computer Equipment* case. It follows that those appointed to represent a WTO Member must be conscious of the value which WTO Bodies may place on their activity and statements, and thus must be adequately trained to properly assess that value.

It is in particular with regard to the EC that it is most interesting to observe the effects of the functioning of the DSU. The effectiveness of the dispute settlement mechanism "condemns" the EC to clarify fundamental institutional aspects of its own system, such as the division of treaty making power between the Council and the Commission, the devising a proper implementation of the requirement of unity in the international representation of the Community for the benefit of its autonomy and of a greater clarity and certainty for the other WTO Members, and also the choice of the proper legal basis for its normative activity (480).

(480) Recently, the WTO dispute settlement mechanism has been invested also with this central issue for the EC institutional system. Subsequent to the adoption by the DSB of the Appellate Body report and the panel report as modified by the first one in the *EC Measures Concerning Meat and Meat Products (Hormones)* case, the period of time to be observed by the EC for the implementation of the DSB recommendations and rulings had to be established. In the absence of an agreement between the parties — the EC on one side, and the US and Canada on the other one — the definition of the "reasonable period of time" of Article 21 DSU was referred to an arbitrator according to para. 3 (c) of that Article. The EC asserted, *inter alia*, that it needed 15 months just for the legislative process it had to follow to implement a new measure abolishing or amending the one deemed incompatible with the WTO system. In fact, since the principal objective of the new measure would be the protection of human health, that act had to be based on Article 100 A ECT, requiring the co-decision procedure. On the contrary, the US and Canada, also by making reference to a 1988 decision of the EC Court of Justice which found that the correct legal basis for a previous EC measure banning hormone-treated beef was Article 43 ECT (*United Kingdom v. EC Council*, case 68/86 [1988] ECR 855), maintained that the new measure had to be based on the same provision relied upon for adopting the EC quashed act, i. e. Article 43 ECT. This provision requires only the qualified majority vote of the EU Council and the simple consultation of the European Parliament, a far less engaging procedure which consequently requires a shorter period of time to be completed. Again, the WTO arbitrator did not decline its competence, obviously deeming that the legal form of implementation may not possibly be left to the discretion of the losing country but, on the contrary, represents a relevant factor for the definition of what

However, the beneficial effects produced by the WTO dispute settlement mechanism reach far beyond this. The requirement of transparency imposed for mutually agreed solutions, primarily aimed at an effective monitoring of the observance of the principle of non-discrimination, together with the policy of broadening the public understanding of the benefits of the WTO pursued by the Organization as well as by its Members, is bringing about another entirely new, impressive, phenomenon: that of an open — and thus democratic — trade diplomacy.

For the first time in international trade relations, the setting up of a system “committed” to transparency, along with the brilliant choice to implement this fundamental feature of the WTO through an online data base which gives general access to all WTO official documents, allow for control of the international activity of the Members which is timely, serious, and complete, since it is within the reach of everyone and not only of those traditionally involved in multilateral trade matters (i.e. international and national officials and economic operators). Therefore, the rigorous observance by all WTO Members of the WTO transparency commitments produces an answer of immediate and high quality effectiveness to the challenge that a cyclopean undertaking such as the Marrakech system presents for their institutional systems: that of guaranteeing democracy in international trade matters ⁽⁴⁸¹⁾.

has to be understood as “reasonable period of time” in a given case. In the light of the new Article 129 provided for by the Treaty of Amsterdam — which specifically addresses “measures in the veterinary and phytosanitary field which have as their direct objective the protection of public health” and requires their adoption on the basis of the co-decision procedure —, and of the EC commitment to withdraw any legislative proposal initiated under the consultation procedure provided for in Article 43 in order to reinstate it under the co-decision procedure once that Treaty has come into force, the Arbitrator followed the EC argument that the implementation of the DSB recommendations and rulings had to take place according to the more demanding decisional procedure. See *EC Measures Concerning Meat and Meat Products (Hormones)*, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes of 29 May 1998, WT/DS26/15, WT/DS48/13.

(481) On the relationship between democracy and the WTO system see P. MENGÖZZI, *Lección Magistral de Investitura del Nuevo Doctor Honoris Causa*, Universidad Carlos III de Madrid, 23 January 1998.

Access to information is the *condicio sine qua non* for the fullest conscious participation in the interpretation, specification and formulation of proposals for modification of the Marrakech Agreements, as well as for the drafting of new WTO Agreements ⁽⁴⁸²⁾. Thanks to the new "open trade diplomacy" produced by the WTO transparency system a "democratic" control of what WTO Members officials agree to under the DSU is now possible. Finally, a multilateral system has been created that permits to the common citizen a clear perception of how his/her sovereign power is exercised with regard to ever increasing aspects of his/her entire life.

(482) The commitment to "improve the transparency of WTO operations" was solemnly proclaimed by the second WTO Ministerial Conference in the *Geneva Ministerial Declaration* adopted on 20 May 1998 on the 50th anniversary of the multilateral trading system (WT/MIN(98)/DEC/1). This Declaration also reaffirms and broadens the work program of trade liberalization and cooperation decided during the first WTO Ministerial Conference, held at the end of 1996 in Singapore (for the text of the *Singapore Ministerial Declaration*, adopted on 13 December 1996, see *WTO Focus* No. 15, January 1997, pp. 7-11).

RAMBOD BEHBOODI (*)

LEGAL REASONING
AND THE INTERNATIONAL LAW OF TRADE:
THE FIRST STEPS OF THE APPELLATE BODY OF THE WTO

SUMMARY: Introduction. — PART I - APPELLATE JURISDICTION IN THE WTO: CONTEXT OF EVALUATION. — 1. Institutional evolution: from negotiation to adjudication. — A. The GATT Experiment. — B. The Appellate Body of the WTO. — 2. Predictability and security: Legitimacy and the interpretive community. — A. The objectives of the Appellate Body. — B. The interpretive community. — PART II - INTERNATIONAL TRADE LAW AS REASON: THE JURISPRUDENCE OF THE APPELLATE BODY OF THE WTO — 1. Building confidence. — A. Atoning for the early 90s. — B. Bringing in the Developing Countries. — 2. Building a legal framework. — A. Establishing the framework. — B. Restructuring the negotiated balance. — Conclusion.

Introduction.

In just over three years into its history, the dispute settlement mechanism of the World Trade Organization ("WTO") has become the most widely used instrument for the pacific settlement of disputes among sovereign states in modern history. To date, over 120 requests for consultations have been notified to the Secretariat of the WTO; more than twenty have been settled; almost as many have found their way to formal dispute settlement; nine have gone through the appellate process. Although the usual suspects — the United States, the European Community and Canada — continue to lead the pack in the number of disputes formally brought before the WTO, *per share* of international trade the situation is, in some

(*) The views expressed in this paper do not necessarily represent the views of the Government of Canada. This paper is also published in the *Journal of World Trade*, vol. 32.

respects, much more encouraging: Developing countries are increasingly assertive of their legal rights and active in pursuing their interests through formal WTO dispute settlement, not only against developed countries, but also against each other. Of the first six appellate disputes that are the subject of this study, *four* involved developing countries (all four having been resolved in favour of the developing country in question), and one was solely between developing countries.

That is the first and the most obvious sign that the compromise on dispute settlement achieved after eight years of negotiations in the Uruguay Round could be said to have been successful ⁽¹⁾. The qualified assessment is not, however, an academic conceit. The success or failure of dispute settlement mechanisms is at best difficult to gauge. For example, according to one assessment, between 1948 and 1989 88% of panel reports under the dispute settlement mechanism of the General Agreement on Tariffs and Trade ("GATT") ⁽²⁾ had been, in one way or another, implemented ⁽³⁾. However, whether this can adequately express the nature of the success of such institutions is open to question. That "success" rate did little to assuage the clamouring of developing and developed world alike for a revamped dispute settlement procedure for international trade disputes ⁽⁴⁾, even though they were far from

(1) In the period 1948-1989, 73% of all complaints under the GATT were filed by the United States, the European Communities and its member states, Canada and Australia. During the same period, 83% of all complaints were filed against the United States, the European Communities and its members states, Canada and Japan. Developing countries were complainants in 19% of cases and defendants in 13% of formal complaints under the GATT. See Robert HUDEC, *Enforcing International Trade Law* (Salem: Butterworths, 1993) at 295.

(2) The term refers to both the institution *and* the treaty text itself. The literature occasionally refers to the text of the agreement as the "General Agreement". The WTO refers to the institution and the agreement as "GATT 1947", to distinguish the institution from the WTO and the agreement from GATT 1994.

(3) Hudec, *op. cit.*, at 286. Of the 88%, 53% were in full satisfaction of the panel report, 29% were in partial satisfaction, and 6% were implemented for independent reasons. See also E.U. PETERSMANN, *The GATT/WTO Dispute Settlement System* (London: Kluwer Law International, 1997) at 88.

(4) Robert E. HUDEC, *Dispute Settlement* in Jeffrey J. SCHOTT, *Completing the*

unanimous as to the shape of the reform required ⁽⁵⁾. The GATT dispute settlement, like an aging conqueror, could perhaps rest on its laurels, but it was in the late stages of terminal illness ⁽⁶⁾.

And so even an early assessment of the dispute settlement mechanism of the WTO, to be complete, would have to examine more than a simple rate of implementation or use of the mechanisms by a more diverse Membership of the WTO.

A reasonable measure of success can be determined by judging the achievements of the institutions against their stated objectives: have they done what they were meant to do? This appears axiomatic; it is. The devil, however, is in the details: what would be the stated objectives against which the growing body of panel and appellate body report should be examined? *Which* of the stated objectives, and stated by whom? And which aspect of the dispute settlement mechanism? Every teleological interpretation exercise suffers from an inevitable measure of arbitrariness. The task is all the more difficult as the Appellate Body of the WTO is a novel creation: novel within the GATT, but also in international law and juridical practice; appellate jurisdiction in international litigation is at best at early stages of infancy.

The laurels of the Appellate Body rest on its early "jurisprudence" — the reports that, although not binding, form a persuasive body of authoritative interpretations within the WTO for future dispute settlement. After briefly examining the institutional evolution of the GATT into the current WTO dispute settlement mechanism, I propose to determine the object and purpose against which the jurisprudence of the Appellate Body should, in my view at any rate, be analyzed. Then, I set out (in no more than a sketch) the context in which Appellate Body reports are received and in which they find their success, through the advancement of the institutional and substantive objectives of the dispute settlement mechanism of

Uruguay Round (Washington, D.C.: Institute for International Economics, 1990) at 181.

(5) Terence STEWART, *The GATT-Uruguay Round: A Negotiating History* (Deventer: Kluwer, 1993) at 2727.

(6) Rambod BEHBOODI, *Industrial Subsidies and Friction in World Trade: Trade policy or Trade Politics?* (London: Routledge, 1994) at 78.

the WTO. In Part II I propose to analyze the first six reports of the Appellate Body within the framework established in Part I. I will conclude that the Appellate Body began on a promising note, but that its report in *Periodicals* ⁽⁷⁾ marked a departure from that path. Since that report, three other Appellate Body reports have been released; due to limited space, an analysis of these reports within the proposed framework must be left to a future study.

The Appellate Body thus stands before a fork in the road: It can choose the path well-trodden by the GATT panels before it, or it can take up the mantle of uniqueness — appellate jurisdiction in international litigation — bestowed upon it and thus mark its own path in the woods. And this could make all the difference.

PART I

APPELLATE JURISDICTION IN THE WTO: CONTEXT OF EVALUATION

1. *Institutional evolution: from negotiation to adjudication.*

Ever since the publication of Professor Jackson's paradigmatic article distinguishing between a "power oriented" and a "rule oriented" structure for international trade law ⁽⁸⁾ much analysis has been done on the evolution of the GATT from a forum for negotiations on tariff concessions, to the sophisticated institutional structure and complex network of "legal" rights and obligations of the World Trade Organization. Even prior to the entry into force of the *Marrakech Agreement Establishing the World Trade Organization* (the "WTO Agreement"), the GATT already encompassed dozens of multilateral and plurilateral agreements, protocols, decisions and understandings, a modestly successful and functioning dispute settlement mechanism and a prodigious membership that included

(7) *Canada - Certain Measures Concerning Periodicals*, WT/DS31/AB/R, Report of the Appellate Body adopted on July 30, 1997.

(8) John H. JACKSON, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States* (1984), 82 Michigan L. Rev. 1570.

rich and poor, developed and developing, East and West, states and customs unions.

It is not the intention here to retell a story oft told, more comprehensively and authoritatively, elsewhere ⁽⁹⁾. Rather, the objective of this section is to draw the reader's attention to some broad themes in the institutional and legal *evolution* of the GATT that are at the core of the institutional and legal *revolution* that took place in Geneva just before midnight on December 15, 1993.

A. *The GATT Experiment.*

Of interest perhaps to students of public international law is the fact that the formalist/realist debate in international law circles ⁽¹⁰⁾ has had a primitive mirror image in international trade law over the last thirty years. The debate between the "pragmatists" ⁽¹¹⁾ and the "legalists" ⁽¹²⁾ was one between those who viewed the GATT as a forum for negotiation (recognizing the role and perhaps the legitimacy of power), and those who thought of it as either an emerging or an established body of laws governing the international trading order. Of course, at the core of the debate, ostensibly about what the GATT *was*, there was a fundamental normative argument about what the GATT *ought* to have been. Did (should) the GATT reflect the political and economic negotiating power of its contracting parties, or was it (should it have been), instead, a system of concrete rules the violation of which would provide grounds for the imposition of countermeasures? Did (should) the dispute settlement mechanism of the GATT serve to help the disputing parties re-

(9) Kenneth DAM, *The GATT* (Chicago: University of Chicago Press, 1970); John H. JACKSON, *World Trade and the Law of the GATT* (Indianapolis: The Bobbs-Merrill Company, Inc., 1969); —, *The World Trading System* (Cambridge: MIT Press, 1989); Robert E. HUDEC, *The GATT Legal System and World Trade Diplomacy* (Salem: Butterworths, 1990); —, *Enforcing International Trade* (Salem: Butterworths, 1993); Petersmann, *GATT/WTO*, *op. cit.*

(10) Martti KOSKENNIEMI, *International Law in Post-Realist Era* (1995) 16 *Australian Yearbook of Int'l Law* 1.

(11) JACKSON, *Law of the GATT*, *op. cit.*, at 755; Olivier LONG, *Law and its Limitations in the GATT Multilateral Trade System* (Dordrecht: Martinus Nijhof Publishers, 1985), at 61.

(12) DAM, *op. cit.*, at 3.

establish a rough balance of economic rights and obligations, when that balance was found to have been disturbed, or were the panels (should they have been) adjudicative bodies whose decisions gave rise to obligations under international law? ⁽¹³⁾

The pragmatists.

The pragmatist approach, or the practice of power-oriented diplomacy, rested on root concepts of negotiation and discussion as the basis for exchange of concessions, as well as for resolution of disputes ⁽¹⁴⁾. Relative power was used to influence the conduct of other countries ⁽¹⁵⁾.

Within this context, dispute settlement was a natural extension of the negotiation process by which the GATT's substantive rules had been determined ⁽¹⁶⁾; the "law" formed, at best, a background to "negotiated diplomatic approach to all policy conflicts" ⁽¹⁷⁾. The fact that the results of the dispute settlement process had to be "adopted" by the CONTRACTING PARTIES ⁽¹⁸⁾, *including the losing party*, clearly pointed to the *political* nature of the apparently legal dispute settlement process. At the extreme, pragmatists did not simply reject law creation through dispute settlement; even law *application* was not considered a proper function for the system. The rules of the system were thus applied through further negotiation as to their application to specific sets of facts ⁽¹⁹⁾. The objective of the GATT, according to the pragmatists, was not the punishment of a delict, the imposition of sanctions against an illegal ⁽²⁰⁾ act, the penalization of a breach of a rule. Rather, the emphasis was through-

(13) See for example Behboodi, *op. cit.*, at 55.

(14) See also Phillip TRIMBLE, *International Trade and the Rule of Law* (1984/85), 83(1) Michigan Law Review 1016 at 1030.

(15) PETERSMANN, *GATT/WTO, op. cit.*, at 66.

(16) Ronald BRAND, *Competing Philosophies of GATT Dispute Settlement in the Oilseeds case and the Draft Understanding on Dispute Settlement* (1993), 27(6) JWT 117 at 121.

(17) HUDEC, *Enforcing, op. cit.*, at 11.

(18) The GATT did not have a legal requirement for unanimous decision-making. This was a custom developed over time and adhered to religiously.

(19) *Ibid.*, at 121.

(20) DAM, *op. cit.*, at 351-352.

out on conciliation; the aim, "to restore, with the minimum interference with trade, the balance of concessions and advantages between the parties in dispute" (21). Accordingly, the dispute settlement procedure of the GATT tended towards flexible procedures, control over the dispute by the disputing parties and the freedom to accept or reject settlements proposed through the GATT panel process; it was, in short, "... a diplomatic forum where parties compromised disagreements rather than a court that settled them ..." (22).

The legalists.

The legalist or rule-oriented approach held that the GATT was, at a minimum, a "legal order-in-embryo" (23). There was no question that it was a legal document, an international treaty (24). "Violation" of the law by a party made it appropriate for the system to try to pressure the violator to "conform its conduct to the code" (25). As legal order, it was argued, the GATT provided a climate of predictability and stability (26) and avoided *ad hoc* solutions reflecting power rather than the "merits of the case" (27). It was against this background that the GATT and, more important, its dispute settlement procedures, gradually adopted a more juridical approach and moved in the direction of legalism and rule-orientation (28). The

(21) LONG, quoting DAM, *ibid.*, at 76; Edwin VERMULST, and Bart DRIESSEN, *An Overview of the WTO Dispute Settlement System and its Relationship with the Uruguay Round Agreements - Nice on Paper but Too Much Stress for the System* (1995), 29(2) JWT 131 at 134; Debra P. STEGER, *WTO Dispute Settlement: Revitalization of Multilateralism After the Uruguay Round* (1996), 9(2) Leiden J. Int'l Law 319 at 319.

(22) PETERSMANN, *GATT/WTO*, *op. cit.*, at 69.

(23) Kendall W. STILES, *The New WTO Regime: The Victory of Pragmatism* (1995), 4 J. Int'l Law & Practice 3 at 4.

(24) DAM, *op. cit.*, at 351.

(25) STILES, *op. cit.*, at 5.

(26) JACKSON, *The Law of the GATT*, *op. cit.*, at 755; PETERSMANN, *GATT/WTO*, *op. cit.*, at 67; LONG, *op. cit.*, at 62; Steven P. CROLEY, and John H. JACKSON, *WTO Dispute Procedures, Standards of Review, and Deference to National Government* (1996), 90 AJIL 193 at 193.

(27) PETERSMANN, *GATT/WTO*, *op. cit.*, at 69.

(28) John H. JACKSON, *The WTO Dispute Settlement understanding — Mis-*

GATT thus developed a third party panel procedure for “adjudicating legal disputes” between disputing parties ⁽²⁹⁾, eventually to be served by a legal office, to enable such parties to “obtain rule oriented, binding decisions in conformity [with] mutually agreed long-term obligation and interests” ⁽³⁰⁾.

Evaluation.

The debate has an air of unreality about it, for to the seeing eye, what the GATT was, was all too apparent in its institutions, “legal” structure (along with the consensus approach to the adoption — the legalization — of GATT panel reports) *and* practice of the parties to the GATT. Jackson observes in his 1997 Editorial in the *American Journal* the “conflicting viewpoints about the appropriate direction and procedure of the Dispute Settlement procedure” ⁽³¹⁾. Nearly thirty years earlier, he had noted the “uncertain compromise” between the contractual and the pragmatic, the “uneasy compromise between conflicting international economic interests, not easily fitting within logical legal processes” ⁽³²⁾.

It was in the context of this “uneasy compromise” that panel procedures to adjudicate “legal disputes” were developed. Diplomats rather than lawyers, early panel members issued “legal rulings [that] were drafted with an elusive diplomatic vagueness. They often expressed an intuitive sort of law based on shared experiences and unspoken assumptions” ⁽³³⁾. And they intuitively interpreted “legal” rules that were “riddled with gaps, inconsistencies, and vagaries — the product of repeated political compromises that were never meant to make any legal sense” ⁽³⁴⁾. Forty years later, the state of the law, and many panel reports, had hardly changed. As if the diplomat’s ap-

understandings on the Nature of Legal Obligations (1997), 91(1) *AJIL* 60, at 62; PETERSMANN, *ibid.*, at 71.

(29) HUDEC, *Enforcing, op. cit.*, at 11.

(30) PETERSMANN, *GATT/WTO, op. cit.*, at 69; re the legally binding force of GATT panel decisions see JACKSON, *Misunderstandings, op. cit.*, at 62.

(31) JACKSON, *ibid.*

(32) JACKSON, *The Law of the GATT, op. cit.*, at 755.

(33) HUDEC, *Enforcing, op. cit.*, at 12.

(34) HUDEC, *Dispute Settlement, op. cit.*, at 187.

proach to international trade law were not enough to highlight the diplomatic nature of the GATT, panel reports thus issued required the *political* imprimatur of the CONTRACTING PARTIES for legal effect.

Therefore, to characterize the GATT solely as a negotiating forum or a legalistic one — that is, anything other than an “uneasy compromise” between law and politics (“a diplomat’s concept of legal order” ⁽³⁵⁾) — risks misunderstanding not only the significance of the transformation in 1993, but also, and more important, the dual nature (legal and political) of the process of *legitimation* that had been deemed necessary for the old order, and that will be required, as I will argue, of the new institutions.

B. *The Appellate Body of the WTO.*

Hudec observes that “[o]n the tree of legal evolution, [international legal institutions] are located near the bottom, much closer to the primitive legal systems studied by legal anthropologists than to the legal systems of modern nations” ⁽³⁶⁾. GATT’s “adjudication machinery” was probably even lower on the evolutionary scale than other international organizations ⁽³⁷⁾. No longer. The establishment of the WTO and its Appellate Body heralded an unprecedented development in the evolution of international organizations at least and, certainly, “a complete novelty” in the history of the GATT itself ⁽³⁸⁾.

Although the body of literature on the institutional aspects of the Appellate Body is not as fully developed as that on the GATT, there has already been a number of studies that describe the institutional structure of the new appellate structure of the WTO ⁽³⁹⁾. It

(35) HUDEC, *Enforcing*, *op. cit.*, at 7.

(36) HUDEC, *ibid.*, at 358.

(37) Robert E. HUDEC, *Public International Economic Law: The Academy Must Invest* (1992), 1 Minn. J. Global Trade 5 at 6.

(38) See PALMETER, *op. cit.*, at 338; Thomas FRANCK, *The Structure of Impartiality*, in Richard FALK, Friedrich KRATOCHWIL, and Saul H. MENDLOVITZ, eds., *International Law: A Contemporary Perspective* (Boulder: Westview, 1985) at 312; WEISS, *op. cit.*, at 86.

(39) See for example (the list is not exhaustive) John H. JACKSON, William J. DAVEY and Alan O. SYKES, *Legal Problems of International Economic Relations* (St. Paul: West Publishing, 1994); Trebilcock, Michael and Robert HOWSE, *The Regulation of International Trade* (London: Routledge, 1995); Donald McRAE, *Emerg-*

is not the intention here to retread this increasingly well-trodden path but, again, to identify the key elements that will be important in the development of a theory of legitimacy for the Appellate Body.

Article 17 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") requires that the Dispute Settlement Body of the WTO ("DSB") establish an Appellate Body ⁽⁴⁰⁾ that would "hear appeals from panel cases". Any such appeal must be limited to "issues of law covered in the panel report and legal interpretations developed by the panel" (Article 17(6)). The members of the Appellate Body must be persons of "recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally" (17(3)). The Appellate Body may "uphold, modify or reverse the legal findings and conclusions of the panel" (17(13)). Finally, unlike panels (under both the GATT and the WTO), the Appellate Body is a *standing* body whose members are appointed for a specific term and who would hear appeals in divisions of three members on the basis of rotation (17(1) and 17(2)).

At least three points need to be highlighted for our purposes. The first is the requirement — absent for panellists — that members of the Appellate Body have expertise in *law* (8(1)). The second is the emphasis on *law* as the basis of appellate review. This is of interest because one searches the DSU in vain for a meaningful mention of *law* in reference to the panel process ⁽⁴¹⁾. It is as if the two provisions (12 and 17) were written by different people: the one, by

ing Appellate Jurisdiction in International Trade Law, in *Fostering Compliance in International Law*, Proceedings of the 1996 Conference of the Canadian Council on International Law, Ottawa; STEGER, *op. cit.*; BEHBOODI, *op. cit.*; STILES, *op. cit.*; Arie REICH, *From Diplomacy to Law: The Judicialization of International Trade Relations* (1996-97), 17(2-3) *Northwestern J Int'l Law & Business* 775 at 804; VERMULST & DRIESSEN, *op. cit.*

(40) See DSB Decision on "Establishment of the Appellate Body". WT/DSB/1.

(41) See in particular Article 12(7):

"Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its *findings in the form a written report* to the DSB. In such cases, the report of a panel shall set out the findings of fact, *the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes*. ..." [emphasis added].

“GATTologists” trying, in one last attempt, to maintain the fiction of non-legal panel “findings and recommendations”; the other, intent on underlining, in bold, the legal character of the entire process. The third is the status of the Appellate Body as a *standing* institution. This is important for maintaining an institutional memory necessary for the long-term coherence of Appellate Body reports ⁽⁴²⁾.

The DSU retains a political check on panel and Appellate Body reports in the form of a consensus in the DSB not to adopt the Appellate Body report. However, the likelihood of such a consensus forming short of a juridical *putsch* would be remote. *De facto*, the Appellate Body of the WTO sits at the apex of a sophisticated, complex and comprehensive *body of laws and legal institutions*. The “uncertain compromise” is defunct. Of course, the resolution of the incoherence at the core of the GATT in favour of law and legalism has a number of consequences. The most important impact of the judicial revolution of 1993 is a change, necessary and inevitable, in the *process of legitimation* of the results of dispute settlement.

2. *Predictability and security: Legitimacy and the interpretive community.*

The previous section provided a brief sketch of the institutional evolution, and revolution, that saw the diplomatic dispute resolution mechanisms of the GATT develop into the unique and judicial dispute settlement process in the WTO, together with “compulsory jurisdiction” ⁽⁴³⁾, adoption on “negative consensus” and appellate review by a standing appellate instance. While the negotiators of the WTO Agreement opted for an “Appellate Body” rather than a “court” ⁽⁴⁴⁾, it would be fair to say that the judicialization ⁽⁴⁵⁾ of the dispute settlement process of the WTO — and thus of the WTO

(42) VERMULST and DRIESSEN, *op. cit.*, at 145.

(43) PETERSMANN, *GATT/WTO, op. cit.*, at 182.

(44) It is, of course, tempting to use familiar terminology. See, for example, Miquel, MONTANA I MORA, “A GATT with Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes” (1993), 31 *Columbia J. Trans. Law* 103 at 160.

(45) E.U. PETERSMANN, *The Transformation of the World Trading System*

Agreement itself — is complete. This section will address the “why” and the “what then” of the reforms to complete the analytical framework in which the existing Appellate Body reports will be evaluated.

A. *The objectives of the Appellate Body.*

According to the DSU, “[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system” (3(2)).

Predictability.

In submitting the Working Procedure of the Appellate Body to the Chairman of the Dispute Settlement Body, the Chairman of the Appellate Body observed that “it is also important to ensure consistency and coherence in our decision-making, which is to the advantage of every WTO Member and the overall multilateral trading system we all share” (46).

Predictability, coherence, consistency: these are the watchwords of the market; they form the first key cornerstone of the WTO dispute settlement process and the Appellate Body; indeed, they are inherent in any legal process (47). They underline one of the most important elements of the shift from the GATT to the WTO: while the GATT was marked by accommodation and adaptability, the legal structure of the WTO now demands consistency and predictability (48). A standing appellate instance is one of the principal means of attaining those objectives.

Security.

A well-functioning dispute settlement process is essential also to the “maintenance of a proper balance between the rights and

Through the 1994 Agreement Establishing the World Trade Organization (1995), 6 *European J. Int'l Law* 161 at 209.

(46) Letter of Julio LACARTE-MURÓ, Chairman of the Appellate Body, to Celso Lafer, Chairman of the Dispute Settlement Body, February 7, 1996.

(47) Friedrich KRATOCHWIL, *Rules, Norms and Decisions* (Cambridge: Cambridge University Press, 1989) at 198.

(48) WEISS, *op. cit.*, at 83.

obligations of Members ..." (3(3)). itself another key objective of the WTO and the GATT before it ⁽⁴⁹⁾. The political control of the contracting parties over the dispute settlement process had been one important means of ensuring that the balance will be maintained. But that was the most visible — and in some ways, the most troublesome — aspect of the process. A subtler means could be found in the "details" of the dispute settlement mechanism. Hudec notes, for example, the important legitimizing role played by GATT panellists themselves, who were not judges apportioning rights and obligations, but rather diplomats who lent a "kind of political legitimacy" to the process ⁽⁵⁰⁾.

As political control is lost, there is a danger that panels will legislate rather than adjudicate and thus rearrange the negotiated balance ⁽⁵¹⁾. Of course, the DSB is explicitly barred from doing so ⁽⁵²⁾. Nevertheless, given the effective emasculation of the DSB in relation to panel reports, recourse to appellate jurisdiction to insure against such a possibility was instrumental in obtaining the agreement of developed and developing states alike to relinquish their control over the dispute settlement process, and to the adoption of panel reports by "negative consensus" ⁽⁵³⁾.

Security, credibility: these are the watchwords of a *juridical* international dispute settlement mechanism; they form the second key cornerstone of the WTO Appellate Body. The Appellate Body, like any other international court or arbitral tribunal, is one that does not — as it *cannot* — rely on "incarceration, injunctive relief, damages for harm inflicted or police enforcement ... jailhouse ...

(49) The preamble to the WTO Agreement, quoting verbatim the preamble to the GATT notes the desire of the parties to enter into "reciprocal and mutually advantageous arrangements ...".

(50) Robert HUDEC, *Dispute Settlement*, *op. cit.*, at 188.

(51) Alan Wm. WOLF, *Comment*, on John H. JACKSON, *Managing the Trading System: The World Trade Organization and the Post-Uruguay Round GATT Agenda*, in Peter B. KENEN, ed., *Managing the World Economy* (Washington, D.C.: Institute for International Economics, 1994) at 154.

(52) Article 3(2) of the DSU: "Recommendations and rulings of the DAB cannot add to or diminish the rights and obligations provided in the covered agreements."

(53) STEWART, *op. cit.*, at 2767-68.

bailbondsmen ... blue helmets ... truncheons or teargas" for the advancement of its objectives ⁽⁵⁴⁾. In a different context, the European Court of Justice found that its authority must be established prudently and through persuasion ⁽⁵⁵⁾; so it is with the WTO Appellate Body that must be content with the "moral and political force of international legal obligation" and a precarious threat of retaliation to maintain order in international trading relations ⁽⁵⁶⁾.

Evaluation.

The WTO dispute settlement process aims to provide predictability and security to its Members. These, and the necessary corollaries such as coherence and credibility, are components of a broader root concept of legitimacy. The subject matter of the enquiry in the following section will be to determine the analytical elements that should form the context in which we could evaluate the performance of the Appellate Body in relation to its stated objectives, as well the root aim of legitimacy.

B. The interpretive community.

Many trees have been felled and bookshelves filled in the pursuit of a single, simple answer to a single simple question: what is law? And for that matter, what is international law? The enquiry into the nature of international *trade* law has never been so rarefied, and for good reason. For much of the history of the GATT, "law" was at best a nuisance, if not an irrelevancy. This may have been because despite the fact that the early panel reports were intuitive and based on unspoken assumptions, the legitimacy of dispute settlement or of the GATT was not brought into question; the rate of compliance with the "vague" and "elusive" early panel reports was high ⁽⁵⁷⁾. The infusion of more law and legalism into the GATT dispute settlement

(54) Judith HIPPIER BELLO, *The WTO Dispute Settlement Understanding: Less is More* (1996), 90 AJIL 416 at 416-17.

(55) Paolo MENGOZZI, *European Community Law* (London: Graham and Trotman: 1992) at 61.

(56) HUDEC, *Dispute Settlement*, *op. cit.*, at 180.

(57) HUDEC, *Enforcing*, *op. cit.*, at 11.

mechanism, though considered necessary, was hardly conducive to its better functioning or legitimacy⁽⁵⁸⁾. Thus, the connection between legitimacy and law was never made; in any event, given the *political* imprimatur of the CONTRACTING PARTIES on the ostensibly *legal/adjudicative* results of the panel process, the question of legitimacy was moot.

The fiction of political "adoption" of panel and Appellate Body reports has been maintained, but in substance it is the Appellate Body that is ultimately responsible for the predictability and security, and as I will argue the legitimacy, of international trade *law*. The rest of this section will concentrate on whether and under what conditions these twin goals are attainable.

Legitimacy.

The question at the base of the enquiry, to quote Franck, is this:

"Why should rules, unsupported by an effective structure of coercion comparable to a national police force, nevertheless elicit so much compliance, even against perceived self-interest, on the part of sovereign states?"⁽⁵⁹⁾.

In the context of international trade law it is not enough to argue that states abide by their obligations because of threat of sanctions or retaliation, for states that normally need not *fear* retaliation also partake in the system and abide by its rules; and, in any event, not every *reaction* to threat of force or of retaliation can be considered an *action* in accordance with the law⁽⁶⁰⁾. The binding force of

(58) *Ibid.*, at 14.

(59) Thomas FRANCK, *Legitimacy in the International System*, in Martti KOSKENNIEMI, ed., *International Law* (New York: New York University Press, 1992) at 159.

(60) NARDIN notes that "[c]oercion alone cannot create rights or obligations of any sort, legal or nonlegal. On the contrary, enforcement *presupposes* the validity of the law that is enforced". Terry NARDIN, *Law, Morality and the Relations of States* (Princeton: Princeton University Press, 1983) at 125. He quotes (at 126) Fitzmaurice to the effect that "... law is not obligatory because it is enforced; it is enforced because it is obligatory; and enforcement otherwise would be illegal." See also Karl OLIVECRONA, *Law as Fact* (London: Humphrey Milford, 1939) at 10-17; Anthony D'AMATO, *Is International Law Really Law?* (1984-85), 79 Northwestern University Law Review 1293 at 1297.

international law — the moral and political force of international legal obligation of which Hudec spoke — must reside in something other than threat of force or of economic sanctions. Compliance with the law is, at least in part, a function of the legitimacy of the law the is to be complied with ⁽⁶¹⁾.

At least four elements for legitimacy can be identified: determinacy of the rules, symbolic validation (and pedigree), coherence (or consistent application) and adherence (to a normative hierarchy). Of particular interest here are determinacy (predictability) and adherence (security).

**Determinacy.*

This is a function of the *clarity* of the rules in question, the WTO Agreement, the *corpus juris* of international trade law. The principal problem is that interposed between the law in question and the states who must implement it is the Appellate Body (and the dispute settlement process as a whole), whose task it is to interpret and apply the law.

Let us, at the outset, dismiss the myth that interpretation is a purely scientific and objective act of finding the “real” meaning of the law. Interpretation is a subjective process, for words do not have a meaning independently of the context in which they are received ⁽⁶²⁾: there is nothing in the composition of the letters t-r-e-e that necessarily attaches it to the thing that francophones call *arbre*. And words can have a number of equally plausible interpretations and meanings: the very notion of a reasoned dissenting judgment would otherwise be meaningless.

Pushed to an extreme the axiomatic observation on the subjectivity of interpretation becomes a “nihilist challenge to the law” ⁽⁶³⁾, according to which, given their ambiguous nature, instead of serving

(61) *Ibid.*, at 158.

(62) Stanley FISH, *Fish vs. Fiss* (1984), 36 Stan. L. Rev. 1325 at 1335; Martti KOSKENNIEMI, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Company, 1989) at XX.

(63) Ian JOHNSTONE, *Treaty Interpretation: The Authority of Interpretive Community* (1991), 12 Mich. J. Int'l L. 371 at 373.

as vehicles for conveying meanings from the communicator to the listener, words become empty vessels for the subjectivities of its interpreters. However, while to an English-speaker the word "tree" may have a margin of indeterminacy ⁽⁶⁴⁾ — a cedar or a poplar, or even a family tree, or a coat tree — it would be rare for anyone wishing to communicate a message to utter the word outside of a specific context. Indeed, absent a significant measure of determinacy in normal discourse, all communication would ground to an immediate halt ⁽⁶⁵⁾.

But what does that say about the interpretive methodology through which words, or norms, are assured a measure of determinacy over a period of time?

One answer may be the idea of "interpretive community", borrowed from literary critics ⁽⁶⁶⁾. This is "simply a way of speaking about the power of institutional settings, within which assumptions and beliefs count as established facts" ⁽⁶⁷⁾. According to Fiss, "legal interpretation is constrained by a set of disciplining rules recognised as authoritative by an interpretive community" ⁽⁶⁸⁾. Law is language; legal norms mandating behaviour of one sort or another depend on the communicative function of language; this communicative function can be served only if there is a general measure of agreement upon the meaning of words used to express those legal norms ⁽⁶⁹⁾.

That general measure of agreement, or "climate of opinion" ⁽⁷⁰⁾, about legal rules is formed within specific *communities*. We have already encountered one such community in the small group of trade policy officials who shared certain "intuitions and assumptions" that

(64) See Williams GLANVILLE, *Learning the Law Ninth Edition* (London: Stevens & Sons, 1973) at 93.

(65) See Philip ALLOTT, *Language, Method and the Nature of International Law*, in Martti KOSKENNIEMI, ed., *International Law* (New York: New York University Press, 1992) at 79.

(66) Owen FISS, *Objectivity and Interpretation* (1982), 34 Stan. L. Rev. 739.

(67) JOHNSTONE, *op. cit.*, at 374.

(68) *Ibid.*

(69) Williams GLANVILLE, *Language and the Law* (1961), 61 Law Quarterly Review 71, at 125-138.

(70) *Ibid.*, at 376.

made their "vague" rulings acceptable — i.e., legitimate — in the early days of the GATT. An expanded membership and mandate for a more comprehensive international trade law order would necessarily encompass a broader set of interpretive receptors than merely the trade officials who negotiated the WTO Agreement. One could, for example, see already included in this community the increasingly visible international trade Bar, trade policy consultants, government trade policy officials, Legal Advisors of Foreign Ministries (to the extent that they are involved in international trade litigation), "publicists" and professors, and nongovernmental organizations.

The interpreter, be it the member of the Appellate Body or a legal advisor to a country about to embark on lawless behaviour, is "constrained by the 'assumptions and categories of understanding' that are embedded in the practice in which he or she has been trained and participates" (71). Thus,

(71) FISH, *op cit.*, at 1333. Franck uses the U.S.-Nicaragua case before the International Court of Justice as an example of the normative force of international legal argument. The U.S. failed in that case to invoke the "Connolly Reservation", which reserved to the U.S. all matters that it deemed "a domestic matter." The U.S. lost on the question of jurisdiction despite having available to it a convenient unilateral escape hatch. It did not do so because, Franck argues, to have used the reservation to justify the mining of Nicaraguan harbours would not have been

"reasonable; it would have seemed absurd. ... Such foreboding of shame and ridicule is an excellent guide to *determinacy*. If a party seeking to justify its conduct interprets a rule in such a way as to evoke widespread derision, then the rule has *determinacy*. ... The violator's evidently tortured definition of the rule can be seen to exceed its range of plausible meanings. ... No verbal formulas are entirely determinate, but some are more so than others". [emphasis added] (FRANCK, *Legitimacy, op. cit.*, at 167).

The interpretive constraints identified by Fish were recognised, in a much cruder form, nearly four hundred years earlier by Lord Coke, one of the greatest English jurists. In the following passage he describes an argument he had with King James I:

"The king said that he thought the law was founded upon reason, and that he and others had reason as well as the judges. To which it was answered by me that true it was that God had allowed His Majesty excellent science and great endowments of nature; but His Majesty was not learned in the law of his realm of England and causes which concern the life or inheritance or goods or fortunes of his subjects; they are not to be decided by natural reason, but by *the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it*" [emphasis added].

“the meaning of a word or set of words is always either clear or capable of being clarified because communication occurs within situations and ‘to be in a situation is already to be in possession of ... a structure of assumptions, of practices understood to be relevant in relation to purposes and goals that are already in place’” (72).

At the most basic level, these structures can be seen as the simple use of *language* and then an official language: we would be rightly surprised if the Appellate Body composed a symphony in response to an appeal, or wrote its decisions in cuneiform, or even Swedish. As a judicial body, the Appellate Body is restricted by its community to engage in “legal reasoning”; a structure that constrains interpretive discretion and gives a measure of determinacy — of predictability — to the legal order.

**Adherence.*

The interpreter is left with at least two core problems that she must overcome: First, even within a set of given assumptions and practices, of “recurring patterns” of argument (73), interpretation always involves a choice. This choice, however, is not in itself predetermined by the interpretive community: if it were, there would no dispute in the first place. In any event, even if the interpretation were *a priori* determinate without recourse to an interpreter, its *application* to the concrete dispute at hand is not *legally* predetermined and requires a choice (74) — a choice that is not legal but policy-based or even political.

Second, merely arriving at a construction or an application that the interpretive community could find palatable — merely giving determinacy to the rules in question — would not solve the broader question of legitimacy. There are at least two reasons for this. First,

Mary Jane MORRISON, *Excursions into Legal Language* (1989), 37 *Cleveland State Law Review* (2) 271, quoting F. MAITLAND, *The Constitutional History of England*, 268-69 (1913), (quoting COKE, *Reports*, XII, 65), at 286 n. 64.

(72) JOHNSTONE, *op. cit.*, at 378, quoting S. FISH, *Doing What Comes Naturally* (1989), at 318.

(73) KOSKENNIEMI, *Utopia*, *op. cit.*, at 48.

(74) KRATOCHWIL, *op. cit.*, at 213; Aulis AARNIO, *The Rational as Reasonable* (Dordrecht: Reidel, 1987) at 47.

the law is not simply a question of arriving at determinate ends; a system based on the raw power of a hegemon may well be a better guarantee of that than relying on an interpretive community. A system of laws is also, if not primarily, concerned with the legitimacy of the *means* of application or enforcement ⁽⁷⁵⁾. This is why systemic or formal validity (or *pedigree*) are, at a minimum, necessary conditions of legitimacy; in view of the discussion above on the role of the interpretive community in constraining the structures of legal argument the means by which interpretations are conveyed to the interpretive community — that the right organ has issued the ruling is *not* sufficient to legitimize the determinate interpretation thus arrived at and applied ⁽⁷⁶⁾. Second, given the nature of the law as context-specific communication, every legal utterance not only conveys a normative meaning as to the conduct to be undertaken (or refrained from), but also carries in itself an unstated assumption about the nature of the legal context in which the statement is made ⁽⁷⁷⁾.

In short, to overcome these problems, the interpreter has to *justify*, using the recurring patterns of argument of her interpretive community, not only that the political choice between competing alternatives fits within the structures of assumptions, relevant practices and goals of the interpretive community, but also that the message it conveys about those assumptions and practices is a correct one ⁽⁷⁸⁾. Interpretation, then, is concerned with persuasion: the interpreter has to show not that she has hit upon The Truth, but that she is operating within those same shared assumptions and

(75) *Ibid.*, at 197.

(76) AARNIO, *op. cit.*, at 6, 39-41.

(77) H.L.A. HART, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) at 26; —, "Definition and Theory in Jurisprudence" (1954), 70 *Law Q. Review* 37, at 291. The use of a specific language by two people for the purposes of communication necessarily and at the very least implies that both speak and understand that language. Further details about the use of that language may give us a clue as to other underlying assumptions: for example, if both use a particular dialect or slang, or jargon.

(78) This is what Franck calls "adherence to a normative hierarchy", and Aarnio "axiological validity", or acceptability within a moral and ethical framework. FRANCK, *op. cit.*, at 164; AARNIO, *ibid.*, at 43.

understandings ⁽⁷⁹⁾. It is not enough that the judicial fiat — the ruling of an interpreter — be rule governed: it must be reasoned and the reasons must be outlined; a judge is not a sports referee ⁽⁸⁰⁾.

Evaluation: International Law of Trade as Reason.

Interpreting legal norms is an iterative process within a specific context. In the context of international trade law and, more specifically, in the emerging legal order that is no longer subject to effective political oversight, the rulings of the Appellate Body cannot find legitimacy merely because they were issued in accordance with the rules set out in the DSU; it is not enough that the Appellate Body be consistent, for it could be consistently *wrong*. While a core objective of the legal order of the WTO and therefore a necessary condition of legitimacy, determinacy (i.e., predictability, the mere invocation of past decisions to justify application to new fact situations) is also not a *sufficient* condition for the legitimacy of Appellate Body rulings.

For the interpretive dialectic to be meaningful, the interpretive community has to be satisfied that the rulings of the Appellate Body are and continue to be grounded in the structures of common assumptions and understandings, that they are in accordance with Reason, and that they are thus *legitimate*. The Appellate Body must show that its claims “satisfy certain criteria”, that they are not simply “arbitrary statements of personal preferences”, that they are not based on “purely idiosyncratic grounds” ⁽⁸¹⁾.

Legitimacy is important for the legal order, and especially the international legal order, precisely because there is no international police force; even where threat of retaliation exists, it is of inconsequential import against larger economies by smaller ones. Since the value of international law and legal obligation is the *internal* constraints one expects it to place on *external* actions of states, legitimacy becomes the *sine qua non* of an effective international legal

(79) ABRAHAM, *op. cit.*, at 124.

(80) Jonathan COHEN and H.L.A. HART, *Theory and Definition in Jurisprudence*, in Frederick SCHAUER, ed., *Law and Language* (Aldershot: Dartmouth, 1993) at 87.

(81) KRATOCHWIL, *ibid.*, at 12.

order. Law as reason is a process of persuasion because it has to work on the reason of the states; in the absence of its persuasive force, the only alternative is self-help, the state of nature.

In the next Part, I will examine the first rulings of the Appellate Body to determine the extent to which the Appellate Body has been successful in not only giving determinacy (predictability) to the rules of international trade, but also gaining adherence (confidence, security) to its rulings through persuasive legal reasoning.

PART II

INTERNATIONAL TRADE LAW AS REASON:

THE JURISPRUDENCE OF THE APPELLATE BODY OF THE WTO

This Part is divided into two sections. In the first section I examine how the Appellate Body set out to kill a demon that had haunted its predecessor: lack of confidence in the ability of the GATT to deal with issues of deep concern to some of its key constituents, the United States to be sure, but also developing countries. In the second section, I discuss the attempt by the Appellate Body to establish a *juridical* framework for its decisions.

It should be noted that the following analysis is not concerned with whether the Appellate Body was right or wrong in its legal analysis; this is not a comprehensive study of the legal provisions discussed by the Appellate Body nor of the legal arguments presented before it. Rather, the aim here is to determine the extent to which the Appellate Body has been cognizant of, and responsive to, the needs of the new legal order for predictability and security.

1. *Building confidence.*

As far as the United States was concerned, the 90s had begun badly. With *Tuna-Dolphin I* ⁽⁸²⁾ and *II* ⁽⁸³⁾, and then with

(82) *United States - Restrictions on Imports of Tuna (Tuna-Dolphin I*; 39S/155) (unadopted).

(83) *United States - Restrictions on Imports of Tuna (Tuna-Dolphin II*; DS29/R), June 1994 (unadopted).

CAFE⁽⁸⁴⁾, there was a growing sense in the United States (and perhaps elsewhere) — however unjustified — that the GATT was unable or unwilling to cope with environmental protection measures. Such adjectives as “out of touch”, “anachronistic” or “ossified” were not uncommonly applied to the organization that, for four decades, had been the centre of global market liberalization. Other interests were now beginning to assert themselves, not the least of which were environmental groups. Wrapped in the flag, the increasingly shrill rhetoric of the left and the right in the richest and most open market in the world threatened its very participation in the WTO; nearly fifty years before the ITO had been stillborn because of similar concerns. That the first WTO dispute to go to a panel was again over an environmental measure of the United States thus presented at once a danger and an opportunity: a report wrongly reasoned could bring the WTO into disrepute from its birth; a good report, however, might begin not only to rebuild the lost confidence of the strong environmental lobby in the international trading order, but also to assure the United States that its concerns about loss of sovereignty were unfounded.

For their part, developing countries had not been particularly enamoured with the GATT. To be sure, the institutional reforms of the WTO should have, in theory, gone a long way to address their concerns. However, the institutional weakness of the GATT had been only one of the problems, even if the most visible, of the old system. Such substantive anomalies as the *Arrangement Regarding International Trade in Textiles* (the “Multifibre Arrangement” or “MFA”) had made a mockery of free trade; its abolition had been a key demand of developing countries throughout the Uruguay Round and the *Agreement on Textiles and Clothing* (“ATC”) had been the resulting compromise. The question was the extent to which *in operation* the compromise could keep the two sides happy.

(84) *United States - Taxes on Automobiles*, DS31/R, 11 October 1994 (unadopted).

A. *Atoning for the early 90s: Reformulated Gasoline* (85).

The Appeal.

The dispute related to the implementation by the United States of the Clean Air Act ("CAA") and a subsequent regulation to control toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the United States. The CAA established certain compositional and performance specifications for reformulated gasoline. To prevent the dumping of pollutants extracted from reformulated gasoline into conventional gasoline, the CAA required that conventional gasoline sold by domestic refiners, blender and importers in the United States be as clean as 1990 baseline levels. Thus, the 1990 baseline rule is an integral element of the Gasoline Rule enforcement process. Baselines can either be individual (established by the entity itself) or statutory (established by regulations and reflecting 1990 average US gasoline quality) depending on the nature of the entity concerned. Domestic refiners that were in operation for at least six months in 1990 are not entitled to use the statutory baseline; foreign refiners, however, may not use individual baselines and must use the statutory baseline instead.

The Panel concluded that imported and domestic gasoline were "like products" and therefore the difference in treatment constituted "treatment less favourable" under Article III:4 of the GATT. Moreover, the baseline establishment method was not justified under Article XX(b) or XX(d). The Panel also found that "clean air" was an exhaustible natural resource, but that the measure was not a measure "relating to" the conservation of exhaustible natural resources.

The appeal by the United States concentrated on the application of Article XX(g) and the interpretation of Article XX generally; the appeal thus had a "sharply limited focus"(at 9). Venezuela and Brazil argued that the measure at issue was not one "relating to" conservation in that it was not primarily intended to achieve a

(85) *United States - Standards for Reformulated and Conventional Gasoline* ("Reformulated Gasoline"), WT/DS2/AB/R, Report of the Panel adopted on May 20, 1997.

conservation goal and it did not have a positive conservation effect. They argued that clean air was not an exhaustible natural resource and that, in any event, the measure did not impose restrictions on the consumption of clean air. On this point, they were supported by Norway and the European Community.

The Report.

The Appellate Body first deals with a preliminary question: since Brazil and Venezuela had not cross appealed the finding of the Panel with respect to the clean air question, they could not now ask the Appellate Body to overturn that finding. The Appellate Body notes in particular that to deal with that issue,

“under the circumstances of this appeal, would have required the Appellate Body casually to disregard its own *Working Procedures* and to do so in the absence of a compelling reason grounded on, for instance, fundamental fairness or *force majeure*” (at 12).

The Appellate Body then turns its attention to the substantive issues at hand. The first question for the Appellate Body is the identification of the “measure” that had to be related to the conservation of natural resources. It determines that the measure in question is the baseline establishment rule, rather than the Gasoline Rule as a whole.

Second, the question was whether the measure related to the conservation of natural resources. The Panel had quoted with approval the analysis of the *Salmon and Herring* Panel Report, in which “relating to” was interpreted as meaning “primarily aimed at”, a somewhat more restrictive interpretation than the words at first glance permit. It had then determined that “no direct connection” could be found between the less favourable treatment and conservation of natural resources.

The Appellate Body observes that it is not clear whether “direct connection” is a substitute for “primarily aimed at”, or whether it was an additional element. In any event, the Panel had asked the wrong question: the issue was not whether the less favourable treatment was related to or primarily aimed at conservation. “Less favourable treatment” is a conclusion in law as to the conformity of

the measure to Article III:4; it is, however, the “measure” itself that is the subject matter of the enquiry in Article XX(g), and not the legal finding (at 16).

The Appellate Body notes as well that the Panel seemed to have used a conclusion it had reached earlier in examining the conformity of the measure to Article XX(b). The Panel had thus overlooked “a fundamental rule of treaty interpretation ... [that] has received its most authoritative and succinct expression in the *Vienna Convention on the Law of Treaties* ...”. Quoting Article 31 of the Vienna Convention, the Appellate Body observes that “[t]hat general rule on interpretation has attained the status of a rule of customary or general international law” and as such it forms part of the “customary rules of interpretation of public international law” that the Appellate Body is directed to apply by Article 3(2) of the DSU. “That direction”, the Appellate Body argues, “reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law” (at 17).

Applying the rules of interpretation, the Appellate Body notes that in view of the difference in wording between different provisions of Article XX,

“[i]t does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized” (at 18).

At the same time, the context of Article XX indicated that although Article XX(g) “may not be read so expansively as to subvert the purpose and object of Article III:4”, Article III:4 must not be given “so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies”. The Appellate Body notes in passing that although the issue had not been raised by either party, “primarily aimed at” was not treaty language and “was not designed as a simple litmus test for inclusion or exclusion from Article XX(g)” (at 19).

Turning to whether the measure was made effective in conjunction with restrictions on domestic consumption, the Appellate Body

does not agree with the Appellee's argument that the measure in question should "make effective" domestic measures in existence. Rather, again referring to customary rules of treaty interpretation, the Appellate Body interprets the requirement as measures that are brought into effect together with restrictions on domestic production or consumption of natural resources. That is, the measures concerned must impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline; "[t]he clause is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources".

The Appellate Body finds that "restrictions on the consumption or depletion of clean air by regulating the domestic production of 'dirty' gasoline are established jointly with corresponding restrictions with respect to imported gasoline". The question, then, is not whether the restrictions achieve the intended results:

"in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable. *The legal characterization of such a measure is not reasonably made contingent upon occurrence of subsequent events*" (at 21) [emphasis added].

Having found the measure in question in conformity with the requirements of Article XX(g), the Appellate Body examines whether it meets the requirements of the chapeau to Article XX. The Appellate Body observes that the chapeau "is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right", they should be applied reasonably.

Determining whether the application of a measure constitutes arbitrary or unjustifiable discrimination is not simply a reiteration of the standard in Article III, because "interpretation must give meaning and effect to all the terms of treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or nullity". The Appellate Body then argues,

"'Arbitrary discrimination', 'unjustifiable discrimination' and

'disguised restriction' on international trade may ... be read side-by-side; they impart meaning to one another. It is clear to us that 'disguised restriction' includes disguised *discrimination* in international trade. It is equally clear that *concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of 'disguised restriction.' We consider that 'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. ... [T]he kinds of considerations pertinent in deciding whether the application of a particular measure amount to 'arbitrary or unjustifiable discrimination', may also be taken into account in determining the presence of a 'disguised restriction' on international trade".

The Appellate Body notes that more than one alternative course of action was available to the United States, such as the imposition of non-discriminatory statutory baselines. The United States could also have entered into "cooperative arrangements with the governments of Venezuela or Brazil ..." (86). The United States, however, had considered that a statutory baseline rule would involve financial costs and burdens for its domestic producers without taking into account the impact of such costs and burdens on foreign producers; "[t]he resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable". The Appellate Body found that the baseline requirements were not in conformity with the chapeau of Article XX.

Evaluation.

1. Of the first six reports, without doubt this was the most sensitive. The challenge was not so much legal as it was political. Legally speaking, many of the issues could have been disposed of without too much difficulty or need to resort to deep analysis. For example, the elaborate discussion about the application of the Vienna Convention was not strictly necessary for arriving at the conclusion that the Panel Report was not legally sound: GATT panel

(86) This is similar to the line taken by the GATT panels in the unadopted panel reports of *Tuna I* and *Tuna II*.

practice had already established that the test in Article XX(b) was different from that in Article XX(g); it is clear that the "direct connection" text developed by the Panel was nowhere to be found in the text of the GATT or its negotiating history. As well, the confusing analysis of the relationship between "disguised restriction" and "arbitrary or unjustifiable discrimination" was not necessary to find that a regime that knowingly imposed costs on imports without doing the same for domestic goods is not strictly justifiable from an environmental perspective, let alone under the WTO.

Rather, as the first Appellate Report *Reformulated Gasoline* had the double burden of laying the foundation of the new legal order *and* justifying its own existence to not just the small group of trade policy officials that had negotiated the WTO Agreement, but also the broader community that would receive and critique the opinion and that could, ultimately, have an important impact on political decision-makers in the various capitals. And it was an environmental measure that came before the Appellate Body; it had to prove that it was sensitive to the "policies and interests" that underlay the environmental exceptions of the GATT. It did so admirably. One is struck by the near total absence of references to market access concerns in the Appellate Body Report. Article III, the principal market access provision after Articles II and XI, should not be allowed to emasculate Article XX, which is no longer characterized as an "exception" to be narrowly construed. On the contrary: "the exceptions of Article XX may be invoked as a matter of legal right ..". And this legal right, limited to some extent by the "primarily aimed at" construction set out in *Herring and Salmon*, is capable of even greater expansion: the Appellate Body almost invites a challenge to the *Herring and Salmon* interpretation and leaves open the possibility of lowering the threshold of connection in Article XX(g).

Thus, environmental protection is a right and not a narrow exception (and capable of greater expansion) under the GATT; environmental concerns should not be allowed to be emasculated by market access concerns. The only requirement is that of *even-handedness*. Not even environmentalists could argue with that.

2. As well as trying to get rid of the aftertaste of *Tuna-Dolphin I and II* and *CAFE*, the Appellate Body's approach shows awareness of another key imperative: establishing a legal framework for the future work of the WTO. As noted in the previous note, much of the analysis of the Appellate Body is not strictly necessary to get its point across *in this specific case*. But of course, that is not the point, or at least, not the only point. The Appellate Body might have quoted Chief Justice Marshall ⁽⁸⁷⁾ or the European Court of Justice in *van Gend en Loos* ⁽⁸⁸⁾, in that the WTO heralded a new legal order, distinct in function and approach from the GATT. It as much as did so by noting that the WTO Agreement cannot be interpreted and applied in isolation from public international law.

Thus, while a sense of continuity is maintained (reference to previous GATT panel reports), a departure is necessary (reference to international law, whether in rules of interpretation, or the principle of effectiveness). This is no longer the negotiating forum in which diplomats negotiated whether and how to apply the rules; it is a system of laws, itself governed by the secondary principles of the community of nations.

3. The Appellate Body report is not perfect. Its interpretation of the "disguised barrier" removed one of the most bizarre anomalies of GATT panel practice that had held that an open trade barrier was not a "disguised barrier". However, by merging the disguised barrier and the arbitrary or unjustifiable discrimination tests of the chapeau, the Appellate Body once again threw the relevance or the utility of the "disguised barrier" test into question. This conceptual confusion might have been irrelevant had the Appellate Body stopped there. However, in applying the chapeau to the US measure, the Appellate Body seems to have done what it accused the Panel of having done: that is, importing the "necessity" — least GATT-inconsistency — test of Articles XX(b) and (d) into the chapeau.

The issue to be determined under the chapeau is not, of course, whether other, less GATT-inconsistent means were available for

(87) See his famous remark: "we must never forget that it is a constitution we are expounding", in *McCulloch v. Maryland* (1819).

(88) Case 26/62, [1963] ECR I at 6.

achieving the objective; this is the “necessity” test. Rather, the question is first, whether the application of the measure amounted to a disguised barrier to trade, in the sense that it served another objective that frustrated the object and purpose of the GATT (i.e., a measure “related to conservation” that resulted in protection of domestic industries), and second, whether the measure resulted in discrimination that was arbitrary or unjustifiable: “arbitrary” in the sense that there was no objective criteria or reasons on the basis of which the discrimination was made; “unjustifiable” in the sense that the discrimination was not in accordance with a set of secondary principles governing the situation at hand.

4. Thus, although for the most part the Appellate Body report is sound, both politically and legally, the application of the chapeau to the measure in question is not wholly satisfactory. Another case will be necessary before the muddled water is cleared up.

B. Bringing in the developing countries.

Cotton Underwear (89).

The Appeal.

The dispute concerned the consistency with the ATC of transitional safeguard measures by the United States on imports of cotton and man-made fibre underwear from Costa Rica. The appeal in this case was by Costa Rica against a finding of Panel that the trade-restrictive measures could have legal effect between the date of publication of the notice of consultations under the ATC and the date of the application of such measures after the consultations. At the Panel stage, the United States had argued that the measures could be imposed as of the date of the *request* for consultations with the countries involved, rather than the date of publication of such request. That claim had not found success, but the Costa Rican

(89) *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear* (“*Cotton Underwear*”), WT/DS24/AB/R, Report of the Appellate Body adopted on February 25, 1997.

argument had been dismissed as well, allowing the Panel to find a middle ground between the two claims.

The resolution of the dispute turned on the interpretation of Article 6 of the ATC. Costa Rica claimed that Article 6 was silent on the issue of backdating of trade-restrictive measures, while the earlier equivalent clause in the MFA did make provision for such measures.

The Report.

As to its rule of interpretation, the Appellate Body states that "... the answer to this question is to be found within Article 6.10 itself — its text and context — considered in the light of the objective and purpose of Article 6 and the ATC" (at 14). The Appellate Body then observes that "'apply' when used as here in respect of a governmental measure — whether a statute or an administrative regulation — means, in ordinary acceptance, putting such measure into operation" (at 14).

However, the Appellate Body notes, the measure may be "applied" only after the expiration of the consultation period, and then only within a 30 day window after the consultation period. In the absence of an authorization to backdate, "a presumption arises from the very text of Article 6.10 that such a measure may be applied only prospectively". The Appellate Body then notes:

"This presumption appears to us entirely appropriate in respect of measures which are limitative or deprivational in character or tenor and impact upon member countries and their rights or privileges and upon private persons and their acts" (at 15).

The Appellate Body then turns to the context of Article 6.10. Noting that Article 6.1 "offers some reflected light on the question of backdating a restraint", the Appellate Body quotes the provision, which exhorts Members to apply such measures "as sparingly as possible, consistently with the provisions of this Article and the effective implementation of the integration process under this Agreement". To permit backdating would allow Members to go to the practice that was widespread under the MFA. Moreover,

"Such an introjection would ... loosen up the carefully negotiated language of Article 6.10, which reflects an equally carefully drawn balance of rights and obligations of Members, by allowing the importing Member an enhanced ability to restrict the entry into its territory of goods in the exportation of which no unfair trade practice ... is alleged or proven. For retroactive application of a restraint measure effectively enables the importing Member to exclude more goods by enforcing the quota measure earlier rather than later" (at 15-16).

The Appellate Body moves to the object and purpose of the requirement for holding consultations. The requirement for consultations, the Appellate body concludes, "is [...] grounded on, among other things, due process considerations; that requirement should be protected from erosion or attenuation by a treat interpreter" (at 16). Members should be given a "real and fair, not merely *pro forma*, opportunity to rebut or moderate" the alleged serious damage.

The Appellate Body then considers another element of the "context" of Article 6.10, "the prior existence and demise, as it were, of the *MFA*". The Appellate Body observes that:

"We believe the disappearance in the *ATC* of the earlier *MFA* express provision for backdating the operational effect of a restraint measure strongly reinforces the presumption that such retroactive application is no longer permissible. This is the commonplace inference that is properly drawn from disappearance. We are not entitled to assume that that disappearance was merely accidental or an inadvertent oversight on the part of either harassed negotiators or inattentive draftsmen. That no official record may exist of discussions or statements of delegations on this particular point is, of course, no basis for making such an assumption" (at 17).

The Appellate Body points out that if the WTO Members had wanted to keep a practice that had been prevalent under the *MFA*, they would have maintained the original language.

After discussing a number of other points of lesser substantive import, the Appellate Body finds the practice of backdating inconsistent with Article 6.10 of the *ATC* and modifies the findings of the Panel to that extent.

Evaluation.

1. Having already established its interpretive methodology in earlier reports ⁽⁹⁰⁾, the Appellate Body no longer feels that it has to examine the nature of the rules of interpretation in customary international law and instead asserts the rule found in Article 31(1) of the *Vienna Convention on the Law of Treaties* (the “Vienna Convention”) (text and context, considered in the light of objective and purpose ...). This shows a body comfortable with its own pedigree: the pronouncement itself — without even reference to the authority of earlier panels — is enough to establish the rule of interpretation.

Of course, one may argue that the Appellate Body is thus saved from reinventing the wheel — restating the obvious interpretive rules — in each case. The interpretive community, it might be argued, is learned: they will have read the earlier reports; they will know what the Appellate Body is referring to. This argument has some validity. In principle, there should be no need for the Appellate Body to go through the step by step cut-and-paste operation of quoting Article 3(2) of the DSU, establishing the Vienna Convention as a codification of customary international law and then quoting Article 31. It should, in principle, suffice to go directly to the principle, already well discussed in the jurisprudence of the WTO.

In principle. The difficulty is that *in practice* it is necessary for the receivers of the reports to know the basis on which the Appellate Body purports to interpret and apply the agreement in question. It is not enough to know that they will look at the text, the context, and the object and purpose. These do *not* constitute the entirety of the rules of interpretation under customary international law and, in any event, it is not clear how these terms are being interpreted in themselves.

2. The casualness with which the rules of interpretation are treated is repeated throughout. The Appellate Body notes the “commonplace inference” that may be drawn from the disappearance of the backdating provision of the *MFA*. That inference, perhaps

(90) *Japan - Taxes on Alcoholic Beverages* (“*Japan Liquor Tax*”), WT/[DS8/DS10/DS11]/AB/R, Report of the Panel adopted on November 11, 1997.

commonplace, is nevertheless known as the logical fallacy of opposition: that just because something is not A, it is NOT-A. This approach was rejected in the recent *Qatar v. Bahrain* case. In that case the International Court of Justice pointed out that the rejection in negotiations of a form of words corresponding to the position asserted by one party did not imply that the thesis of the other party had to be upheld ⁽⁹¹⁾. The Appellate Body may well be correct in its assessment as to why the provision was left out of the ATC; there is, however, no evidence one way or another. Neither is there any elaboration. In the end, we have only the commonplace inference of the Appellate Body to rely upon.

The Appellate Body's understanding of the *MFA* affects the interpretation of the ATC in other ways. To read the ATC to allow the states what they used to do would be to loosen the careful balance of Article 6.10. The Appellate Body speaks the language of the trade diplomat: the bargain has been struck, we must not disturb it. That would be a sound approach, if we had been persuaded earlier what the nature of the bargain had been. Based on the evidence presented in the Appellate Body report itself, it is equally probable that parties thought the practice of backdating to be so pervasive, so *acceptable*, as to no longer require explicit legal protection; or, that the Parties simply could not *agree* whether to continue to protect it legally or not. In either case, to read Article 6.10 to prohibit backdating, to concretize that which had been left (at worst) vague, would be to reapportion the negotiated balance.

3. The Appellate Body report cannot be understood as a legal document; however, it is an effective exercise in rhetoric (in its classical sense), in *persuasion*. The Appellate Body is aware of its audience, the community in which its reports are received, the circles that will discuss its reasoning (such as it is) and conclusions. Thus, where rights of the private parties are affected, "limitative" provisions must be construed narrowly; consultations must be "real and fair, not merely *pro forma* ... grounded on ... due process considerations". The

(91) *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Jurisdiction and Admissibility)*, [1995] ICJ Reports 1995 6, at 22, para. 41.

Appellate Body speaks in a language familiar to the jurist or the advocate. It does not explain what it means by "due process" — does Costa Rica have any rights to claim against the United States other than those specifically stated? The right to counsel? The right to be "heard" by the United States? That "due process" is nowhere to be found in the text of WTO Agreement should have ordinarily led to the "commonplace inference" that it was not intended. Of course that would be nonsense: due process is branded upon the professional consciousness of the occidental jurist. It would simply be unreasonable to hold or argue otherwise. Likewise, the talk of protecting the interests of private parties (and here the Appellate Body picks up where the Panel left off with its transparency requirement) would have a particular resonance in trade circles ⁽⁹²⁾.

Having thus invoked a juridical *commonplace* ⁽⁹³⁾, the Appellate Body then implies another: judicial self-restraint. It notes that the requirement concerning substantial consultations should be "protected from erosion or attenuation by a treaty interpreter". That might be so, if there were such a requirement. If, on the other hand, no such requirement exists, treaty interpreters should not erode or attenuate the rights of parties *not* to engage in substantial consultations; to do otherwise would be judicial activism — expressly prohibited by the DSU.

4. Tucked away in a paragraph to which it does not logically belong is the core objective of the Report: The Appellate Body states that it has to take into account that

"the standards and requisites of Articles 6.10 and 6.11 are to be read together against the background consideration that the ATC constitutes a temporary and transitional regime with complete integration of the textile and clothing sector into the *General Agreement* as the final goal" ⁽⁹⁴⁾.

The Appellate Body cannot be clearer: the end is nigh for the

(92) See *van Gend en Loos*, *op. cit.*; MINGOZZI, *op. cit.*

(93) See KRATOCHWIL, *op. cit.* He uses the word to refer to basic juridical axioms that do not need further proof, because of widely held beliefs as to their truth.

(94) *Cotton Underwear*, *op. cit.*, at 20.

ATC regime; in the meantime, it will be construed narrowly. A small step for Costa Rica; a giant step for developing countries that have been fighting against the MFA for decades. The Appellate Body does not ignore the other party: this is all in furthering due process, protecting the rights of private parties to transparency and predictability, affirmation of commonplace inferences, principle of effectiveness (invoked almost as an afterthought) ⁽⁹⁵⁾, and the like. These juridical *commonplaces* have a deep resonance in the psyche of the jurist and can therefore serve as particularly useful rhetorical devices for advancing an argument in an emerging legal system. While less than rigorous as pure legal analysis, the report is oddly persuasive to both the diplomat and the jurist. The Appellate Body speaks to the winner and the loser alike, the very casualness of its approach implying that to think otherwise would be unreasonable, perhaps even absurd: who can argue with due process, a commonplace inference?

Wool Shirts ⁽⁹⁶⁾.

The Appeal.

This case also involved a safeguard measure pursuant to Article 6 of the ATC. The measure had been imposed by the US following a finding by the Textile Monitoring Body that actual threat of serious damage from sharp and substantial imports from India had been demonstrated. Following a dispute launched by India, the Panel found that the US restraint measures violated the relevant provisions of the ATC. India appealed the panel ruling on three issues: the burden of proof, the relevance of the TMB, and judicial economy.

India contested the Panel finding that it had the burden of providing a *prima facie* case of violation on the part of the United States. Rather, since the ATC constituted an exception to the GATT, the United States had the burden of proving that it was in compli-

(95) *Ibid.*, at 16; the Appellate Body notes at the end of the paragraph that "[t]he principle of effectiveness in treaty interpretation sustains this implication."

(96) *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Panel adopted May 23, 1997.

ance with the obligations set out in the ATC. India argued as well that the TMB should not have expressed any views on transitional measure that had not yet been taken. Finally, India objected to the practice of the Panel not to provide a finding on every issue raised by the Parties.

In response, the United States argued that India and the United States had differing burdens of proof. Once India had established a *prima facie* case, the United States had the burden of convincing the Panel that, at the time of its determination, it had respected the requirements of Article 6 of the ATC. The United States objected to the "simplistic" taxonomy of India that treated all "exceptions" identically. India ignored that in addition to "obligations", WTO Members also had rights; many of what would be considered "exceptions" by India are more properly viewed as "rights". As to the Panel's observations on the TMB, the United States viewed these as *obiter dicta* and inconsequential to the resolution of the dispute. Finally, with respect to the question of "judicial economy", the United States noted that nothing in the DSU or the WTO Agreement mandates a panel to rule on every legal issue raised. According to the United States, the primary function of the dispute settlement system was to resolve disputes by achieving the withdrawal of WTO-inconsistent measures, not to render interpretations or to generate opinions on any issue. The United States rejected the argument that the DSU had the twin objective of dispute resolution and dispute prevention. It was simply unnecessary to address the other issues involved.

The Report.

Quoting the finding of the Panel on the question of burden of proof, the Appellate Body observes that the findings and comments of the Panel "are not a model of clarity", but also that the Panel had not erred in law (at 16). The Appellate Body then begins its own discussion of the question of burden of proof by noting that the foundation of dispute settlement is "the assurance to members of the benefits accruing directly or indirectly to them under" the GATT. It is clear that if there is a violation, there is a *prima facie* case of nullification

and impairment. But which party has the burden of demonstrating that there has, or there has not been, such a violation?

As a *question de base* the Appellate Body wonders “how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof”. It then turns to two sources: practice before the International Court of Justice and general practice of states. It finds that the burden of proof rests on any party that

“asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption” (at 17).

How much and what kind of evidence is a matter that would vary from measure to measure, provision to provision and case to case. In response to the contention of India with respect to the burden of proof regarding exceptions, the Appellate Body notes:

“The ATC is a transitional arrangement that, by its own terms, will terminate when trade in textiles and clothing is fully integrated into the multilateral trading system. Article 6 of the ATC is an integral part of the transitional arrangement manifested in the ATC and should be interpreted accordingly. ...[W]e believe that Article 6 is ‘carefully negotiated language ... which reflects an equally carefully drawn balance of rights and obligations of Members’ That balance must be respected” (at 19).

A party claiming a violation of a provision must therefore not only assert, but also prove its case.

With respect to the observation of the Panel on the TMB, the Appellate Body characterises it as “purely a descriptive and gratuitous comment” and does not consider it as a legal finding or conclusion capable of being upheld, modified or reversed. The Appellate Body further upholds the prevailing GATT panel practice of addressing only those issues that the panel considers necessary to dispose of the matter. The Appellate Body specifically rejects the implicit suggestion that it should “make law” by clarifying existing provisions of the WTO Agreement “outside the context of resolving a particular dispute. A panel need only address those claims which

must be addressed in order to resolve the matter in issue in the dispute" (at 23). Providing authoritative interpretations of the WTO Agreement is within the exclusive authority of the Ministerial Conference and the General Council.

Evaluation.

1. Two points are immediately striking. The first is unanswerable and, at first glance, seems to have little to do with the approach of the Appellate Body: why did India appeal? The second is that the reasoning of the Appellate Body in this case is much tighter and based much more squarely on traditional legal grounds (as opposed to *rhetoric*) than the Appellate Body Report in *Cotton Underwear*.

One possible answer to the first question — an answer that would also explain the second observation — is that the intuitive approach of the Appellate Body in *Cotton Underwear* may have unintentionally sent a mixed message to the Members of the WTO and, in particular, certain developing countries. *Cotton Underwear* held that the ATC had an *exceptional* character. The zeal of the Appellate Body in drawing commonplace inferences here and there and in reading "due process" into the provisions of the ATC may have strengthened the impression that the safeguard measure of Article 6.10 was an exception in the sense that its user has to *justify* its use; the Appellate Body had in any event noted that the provision, as a limitative and deprivational provision, had to be construed narrowly.

Thus it was that the Appellate Body found itself in the presence of an argument that did not accord with reason: that the mere assertion of a claim amounted to proof, an argument at odds with a principle of long standing at both common law and civil law, and adopted both in international law and in GATT panel practice. It had, in addition, to construct a reasoned and balanced report patently at odds with the approach and the tenor of its previous foray into the world of textiles.

2. *Cotton Underwear* served the security or adherence objective by using legally evocative language and assuring developing countries that the system worked for them; *Wool Shirts* had to serve

the other important element of legitimacy: determinacy and predictability. This the Appellate Body did with grace and persuasiveness. It could simply have relied on past panel practice to settle the burden of proof issue; instead, the Appellate Body chose to examine international law and practice before domestic tribunals to make a single, simple and effective statement about burden of proof: a party making a positive assertion or defence has the burden of establishing it. The very comprehensiveness of its examination of the issue is likely to settle the matter for the time being. Incidentally, by comparing itself to other international and domestic judicial tribunals, the Appellate Body also implicitly reaffirmed the complete judicialization of the dispute settlement process of the WTO.

3. The Appellate Body's revisitation of the place of the ATC within the scheme of the WTO Agreement is a cogent defence of the balanced nature of Article 6 of the ATC, the ATC itself and, by implication, the WTO Agreement. "Balance" is, of course, a core concept in international trade law. A trade agreement expresses a delicate and carefully achieved balance of economic rights and obligations between the parties within a specific historical context. This has been repeatedly acknowledged in GATT panel practice where, given equally plausible alternative interpretations, GATT panels applied that interpretation which best maintained the intended balance of the agreement ⁽⁹⁷⁾. This is important for the

(97) See e.g.: *United States - Measures Affecting Alcoholic and Malt Beverages* (1992), GATT Doc. DS23/R, para. 5.79, BISD 39S/206 at 296. The Panel, noting with approval the unadopted report of the panel on *Canada - Measures Affecting the Sale of Gold Coins*, observed that:

"...the qualification in Article XXIV:12 of the obligation to implement the provisions of the General Agreement grants a special right to federal states without giving an off-setting privilege to unitary states, and has to be construed narrowly so as to *avoid undue imbalances in rights and obligations between contracting parties with unitary and federal constitutions*" [emphasis added].

The Panel in the *Gold Coins* case had observed in addition that:

"64. The Panel considered that, as an exception to a general principle of law favouring certain contracting parties, Article XXIV:12 should be interpreted in a way that meets the constitutional difficulties which federal States may have in ensuring the observance of the provisions of the General Agreement by local governments, *while minimizing the danger that such difficulties lead to imbalances*

acceptability of the WTO Agreement. Clearly not every "market-restrictive" right in the WTO Agreement is an exception: if Article II of the GATT prohibits the imposition of tariffs above the level of tariff bindings, it implies also *a right* to do so within the bound level without justification. WTO Members must feel secure about not only the market access concessions that they have obtained from their trading partners, but also the protective measures to obtain which they had to give concessions of their own. To ignore one at the expense of the other would be to hollow out the core of the bargain.

4. The Appellate Body's discussion of the principle of judicial economy is not as strong as its treatment of the burden of proof or the balance at the core of the WTO Agreement. The principle, as developed by the Appellate Body, is at war with itself.

On the one hand, panels are enjoined to limit their findings to only those issues that they must decide for the resolution of the dispute *between the parties involved* and not venture to make law in other areas or for posterity. On the other hand, since panels should not be reinventing the wheel in every report and since determinacy and predictability are key objectives, they might, would and perhaps even should look at the "persuasive authority" of previous panel and Appellate Body reports for guidance as to the interpretation and application of the provisions in question. Of course, by so doing panels would be reaffirming the principles set out in a different case dealing with different disputing parties.

Judicial restraint is an important principle for panels and the Appellate Body to observe. The question is the extent to which it is reinforced by reiteration alone, when the practice, as we will see below, shows a much more activist judicial organ.

2. *Building a legal framework.*

In addition to the important political imperative of giving assurances to the United States and developing countries that the

in the rights and obligations of contracting parties" [emphasis added] (1985), GATT Doc. L/5863 at 21.

WTO understands and protects their interests, the legal structure of the WTO had requirements of its own. While cognisant of the balance at the heart of the WTO Agreement and the necessity of maintaining that balance, the Appellate Body was also aware (as we saw in both *Reformulated Gasoline* and *Wool Shirts*) of the importance of building that balance, of giving effect to the compromises of the WTO Agreement in the context of a legal order.

The three reports that will be examined here are important because the question of balance does not figure prominently in the analyses of the Appellate Body; no deep political motivations needed to be taken into account. In *Japanese Liquor Tax* and *Periodicals*, the disputes were between developed countries; the outcome, one way or another, of either dispute, however sensitive the protected sectors, was unlikely to motivate any of the principal actors to leave the WTO or even to undermine it by intemperate rhetoric. In *Coconuts* both parties were developing countries and the question at issue was not likely to present itself again before the WTO panel.

Thus, despite its protestations to the contrary in *Wool Shirts* and precisely because of its mandate to give predictability and security to the international trading system, in the three cases that follow the Appellate Body could do what appellate jurisdictions the world over do: consciously build a framework, brick by judicial brick, for the future interpretation and application of the WTO Agreement. But for *Periodicals*, the framework reports of the Appellate Body contribute significantly to both objectives and therefore to the legitimacy of the WTO; *Periodicals* represents a singularly regressive step into the bad habits of the old GATT panels and, more disturbing still, a possible attempt at restructuring a balance that, in the Appellate Body's view, might not have seemed in accordance with the liberalization scheme of the Uruguay Round.

A. *Establishing the framework.*

The Appellate Body had set out the basic elements of its interpretive approach in *Reformulated Gasoline*: the WTO Agreement was an international legal document and was to be treated that way. The text of the treaty was to be read in context and with a view to its object

and purpose; the provisions of the treaty were to be given useful effect. More important, the Appellate Body was going to explain and justify its legal reasoning, rather than merely rely on past practice or negotiating history for interpretive guidance and intuitive sympathy for political acceptance. The next case to arrive before the WTO concerned not the environment — a difficult area and therefore susceptible to resulting in bad law — but a rematch between the top four trading entities in the world over Japan's liquor tax regime.

Japanese Liquor Tax.

The Appeal.

The appeal and cross-appeal were from the panel report that had found Japan's liquor tax regime inconsistent with Article III:2 of the GATT. Japan appealed from the Panel's findings and conclusions as well as from certain of its legal interpretations. It argued that the Panel had erred in disregarding the need to determine whether the Japanese liquor tax regime had the aim of affording protection to domestic production, ignoring whether there is the linkage between the origin of the product and the tax treatment they incur and not giving proper weight to the basis on which the Japanese tax regime operated.

The United States supported the Panel's overall conclusion but appealed on the question of the interpretation of Article III:1 and Article III:2 and Article III generally. The United States disputed that "likeness" can be determined purely on the basis of physical characteristics, consumer uses and tariff classification without considering also the context and purpose of Article III as a whole and without considering whether regulatory distinctions are made "so as to afford protection". The United States also argued that the panel erred in incorrectly characterizing adopted panel reports as "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention.

The European Community, responding to the Japanese appeal, argued that the panel had been correct in concentrating on the physical characteristics of the products in question for its "like product" analysis. However, the European Community supported the United

States' position that adopted GATT panel reports did not constitute subsequent practice within the meaning of the Vienna Convention.

Canada confined its arguments to Article III:2 second sentence and supported the panel's determination.

The Report.

The Appellate Body, referring to *Reformulated Gasoline* started by setting out Articles 31 and 32 of the Vienna Convention as embodying the customary rules of interpretation in international law, according to which the WTO Agreement was to be interpreted and applied. The Appellate Body then reiterated the principle of effectiveness, again quoting its earlier analysis in *Reformulated Gasoline*.

The Appellate Body then turns its attention to the status of adopted panel reports. It determines that adopted panel reports did not constitute subsequent practice, as the decision by the CONTRACTING PARTIES to adopt such reports did not constitute agreement on the legal reasoning of that panel report. According to the Appellate Body,

“[t]he generally-accepted view under GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report” (98).

The Appellate Body notes that under Article IX:2 of the WTO Agreement, the Ministerial Conference and the General Council have the exclusive authority to adopt interpretations of the WTO Agreement and of the Multilateral Trade Agreements. Therefore, such authority cannot reside elsewhere, by inadvertence or by implication.

This does not mean that GATT panel reports are without value. First, the “legal history and experience” under the GATT 1947 had to be brought into the WTO “in a way that ensures continuity and consistency in a smooth transition from the GAT 1947 system”. Second, GATT panel reports

(98) *Japanese Liquor Tax*, *op. cit.*, at 13.

“create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute” (at 14).

As well, while disagreeing with the Panel that GATT panel reports constituted subsequent practice within the meaning of the Vienna Convention, the Appellate Body agrees with the Panel's conclusion that unadopted panel reports have not legal status, even though a panel “could nevertheless find useful guidance in the reasoning of unadopted panel report that its considered to be relevant”.

The Appellate Body then moves on to Article III. It opens its analysis with a statement of principle:

“The *WTO Agreement* is a treaty — the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the *WTO Agreement*” (at 15).

Thus,

“Members of the WTO are free to pursue to their own domestic goals through international taxation or regulation so long as they do not do so in a way that violates Article III or any of the other commitments they have made in the *WTO Agreement*” (at 15).

The broad purpose of Article III is to avoid protectionism, not only in respect of items on which tariff concessions are made, but also products not bound under Article II. The Appellate Body notes that this interpretation was confirmed by the negotiating history of Article III. This broad purpose can be seen in Article III:1, which forms part of the context in which the rest of Article III should be interpreted. However, different wording in different parts of Article III means that Article III:1 informs different parts of Article III differently. This is particularly the case in Article III:2, in the different wording of the first and second sentences.

Noting that Article III:2 first sentence does not refer directly to Article III:1, the Appellate Body concludes that:

“the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence” (at 18).

Thus, all that is required under this provision is to determine whether the taxed imported and domestic products are like, and then whether the taxes applied to the imported products are “in excess of” those applied to the like domestic product. However, because the second sentence of Article III:2 provides for a “separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products”, the term “like product” in the first sentence should be construed narrowly.

The Appellate Body referred with approval to the practice of GATT panels to determine whether products are “like” on a case-by-case basis. The Appellate Body was careful to note, however, that decision-makers should keep in mind

“how narrow the range of ‘like products’ in Article III:2, first sentence is meant to be as opposed to the range of ‘like’ products contemplated in some other provisions of the GATT 1994 and other Multilateral Trade Agreements ...” (at 20).

In any event, this determination will always involve an “unavoidable element of individual, discretionary judgement”. This does not imply arbitrariness, but that the discretion must be exercised on a case-by-case basis.

After upholding the determination of the Panel with respect to the interpretation of Article III:2 second sentence, the Appellate Body turns to the question of “aim and effect” in determining whether differential taxation was applied “so as to afford protection”. The Appellate Body observes that,

“It is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weight the relative significance of those reasons to establish legislative or regulatory intent. If the measure is applied to imported or

domestic products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure. ... This is an issue of how the measure in question is *applied*" (at 27-8).

Merely dissimilar taxation is not enough, however. As the Appellate Body notes,

"The dissimilar taxation ... may be so much more [than *de minimis*] that it will be clear from that very differential that the dissimilar taxation was applied 'so as to afford protection'. ... Yet in other cases, there may be other factors that will be just as relevant or more relevant to demonstrating that the dissimilar taxation at issue was applied 'so as to afford protection'".

The Appellate Body concludes with another statement of principle:

"WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the 'security and predictability' sought for the multilateral trading system" (at 31).

Evaluation.

1. Alone among Appellate Body reports does the *Japanese Liquor Tax* Appellate Body report begin and end with overarching statements of principle. Such grand declarations are tools of rhetoric — persuasion and justification — rather than of interpretation. They do not help in understanding the meaning of the terms discussed, but rather the thinking of the interpreter behind her decision, her interpretation and application of the provisions in question — or, at least, what the interpreter thinks is the most persuasive mode of communication with her interpretive community.

These statements are important in this instance because the Appellate Body was about to embark on two difficult missions: first, the examination of a domestic system of classification and taxation, one of the most closely guarded vestiges of sovereignty; and second, the confirmation of the about face of the Panel on the interpretation

of “like products”. The Panel had explicitly overturned the interpretation used in *Beer II* and followed in the unadopted panel report in *CAFE*. The invocation at the end of the Appellate Body Report of the twin pillars of the dispute settlement mechanism of the WTO was therefore no accident. For the sake of predictability and determinacy, it was necessary to abandon the unworkable “aim-and-effect” test in favour of the approach of the first *Japanese Liquor Tax* panel report; for the sake of security and confidence, it was necessary that any additional intrusion into areas of state sovereignty be done in the name of that *sovereignty itself*: By applying the WTO Agreement, the Appellate Body is merely applying the sovereign will of each state to that state. Here, the Appellate Body approaches the development of the jurisprudence of the WTO with a measure of prudence absent in earlier GATT panel reports.

2. Another striking element of the Report is its conscious effort to ground its conclusions on sound legal reasoning, and by that I mean more than simply good technical analysis of the words and context of the treaty involved. The Appellate Body, much like other appellate jurisdictions, is not afraid to look outside the four corners of the legal order to which it belongs. This is more than not interpreting in “clinical isolation” from public international law; it is a frank acknowledgement that international trade law is now truly a legal order, having in common *approaches, structures and understandings* with other legal orders from which it can draw inspiration and guidance; it is an implicit identification of the juridical interpretive community into which the jurisprudence of international trade dispute settlement will henceforth be received.

3. The case is paradigmatic also because of its subject matter — not alcohol, even though most key decisions of this and other international trade liberalizing orders seem to have been made because of alcohol, but Article III. As tariffs are lowered (in most cases, especially for the developed world, to levels that are only of statistical interest) and overt quotas and trade barriers are removed, products increasingly come into contact with discriminatory domestic taxation or regulatory regimes and disguised protectionist measures. Thus, Article III is likely to become one of the more widely

invoked provisions of the WTO Agreement in dispute settlement proceedings. Just as it was *politically* necessary for the Appellate Body to get the analysis of the environmental protection clauses of Article XX "right", it was crucial for the proper functioning of a predictable legal order that the Appellate body clear up the mess left behind by *Beer II* and *CAFE*: not so much because those reports were "wrong", but because they were a departure from forty years of interpretation for no good reason whatever. That departure, the Panel and the Appellate Body implicitly observed, had been unwarranted.

Thus it was that the Appellate Body could observe that its approach served well the objectives of predictability and security.

Coconuts ⁽⁹⁹⁾.

The Appeal.

This was an appeal by the Philippines from the Report of Panel concerning, among others, the application of Article VI of the GATT to countervailing duties imposed by Brazil pursuant to an investigation that had begun before the entry into force of the WTO Agreement. The *Agreement on Subsidies and Countervailing Duties* ("SCM Agreement") did not apply to the investigation in question. The Panel had concluded that Article VI, as part of an integrated system, was not capable of being applied in isolation from the SCM Agreement, and was therefore inapplicable to the countervailing duties in question. The Panel had also concluded that the *Agreement on Agriculture* was not applicable, and that Brazil's failure to consult was not within its terms of reference.

The Philippines argued that the Panel had erred in concluding that Article VI of the GATT could not be applied independently of the SCM Agreement; indeed, the Panel had erred in starting its analysis by examining Article 32(3), as the SCM Agreement had not even been invoked by the Philippines. That Article exempted the

(99) *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, Report of the Appellate Body adopted on 20 March 1997.

application of the SCM Agreement to procedures that had begun before the entry into force of the WTO Agreement, but it did not exclude the application of Article VI of the GATT to definitive Countervailing Duties imposed after the entry into force of the WTO Agreement.

Brazil argued that it was appropriate and in accordance with the principles of international law for the Panel to have first determined whether it had jurisdiction to consider the dispute before considering the substantive merits of the Philippines' claims. The question of whether the WTO Agreement applied was not just a claim, but a fundamental jurisdictional issue. The plain language of Article 32(3) prohibited the application of the SCM Agreement to this dispute, while the context prevented the application of the whole of the WTO Agreement. The WTO Agreement and the multilateral trade agreements were intended to be applied as a whole; they were an integral whole and had to be considered together.

The Report.

The Appellate Body begins by characterizing a countervailing duty as "the culminating act of a domestic legal process which starts with the filing of an application by the domestic industry". It then observes that the WTO Agreement is fundamentally different from the GATT. Under the old system, the GATT and the Codes had separate legal identities and sometimes even different dispute settlement procedures. Thus, a complaining party could choose to bring a challenge under Article XXIII or under one of the Codes.

Unlike the GATT, however, the WTO Agreement is a "single treaty instrument which has been accepted by the WTO Members as a 'single undertaking'". The Multilateral Trade Agreements are "integral parts" of the WTO Agreement, and in the event of a conflict between a provision of the GATT and one of these Agreements, the latter shall prevail to the extent of the conflict.

With respect to the question of dispute settlement, unlike the GATT the DSU provides an integrated dispute settlement mechanism applicable to disputes arising under any of the covered agree-

ments. A panel may deal with all the relevant of the covered agreements cited by the parties to the dispute in one proceeding.

The GATT 1994 is legally distinct from the GATT 1947. This is not just a legal formality; the two agreements are substantively different. (at 14) The Appellate body observes that “[a]lthough the provisions of the GATT 1947 were incorporated into, and became a part of the GATT 1994, they are not the sum total of the rights and obligations of WTO Members concerning a particular matter”. The other goods agreements represent a “substantial elaboration of the provisions of the GATT 1994”. The fact that the provisions of the other agreement prevail in the event of a conflict with the provisions of the GATT 1994 does not mean that the other goods agreements supersede the GATT 1994. Rather, as the Panel held with respect to the issue at hand, the question is whether “Article VI creates rules which are separate and distinct from those of the SCM Agreement, and which can be applied without reference to that Agreement”, or whether they represent “an inseparable package of rights and disciplines that must be considered in conjunction” (at 15).

To find the answer the Appellate Body turns to the text and context of Article 32.3 of the SCM Agreement. Article 10 of the SCM Agreement provides that countervailing duties may only be imposed in accordance with Article 10 *and* the SCM Agreement; Article 32.1 provides in turn that a countervailing duty may only be imposed in accordance with the provisions of GATT 1994, as interpreted by the SCM Agreement. The Appellate Body concludes that:

“The ordinary meaning of these provisions taken in their context leads us to the conclusion that the negotiators of the *SCM Agreement* clearly intended that, under the integrated *WTO Agreement*, countervailing duties may only be imposed in accordance with the provisions of Part V of the *SCM Agreement* and Article VI of the GATT 1994, taken together. If there is a conflict between the provisions of the *SCM Agreement* and Article VI of the GATT 1994, furthermore, the provisions of the *SCM Agreement* would prevail as a result of the general interpretative note to Annex 1A” (at 17).

The Appellate Body notes the absence in the SCM Agreement of the note in the preamble of the old Subsidies Code that provided

that the “terms of this agreement” should mean the provisions of the General Agreement as interpreted and applied by the Code. Observing that the preamble had not been retained and that the SCM Agreement went beyond the terms of the General Agreement, the Appellate Body agreed with the Panel that “the exclusion of this provision from the SCM Agreement [did not shed] much light on the question before us”.

The Appellate Body then notes that “[i]f Article 32.3 is read in conjunction with Article 10 and 32.1 of the *SCM Agreement*, it becomes clear that the term ‘this Agreement’ in Article 32.3 means ‘this Agreement *and* Article VI of the GATT 1994’”. Quoting at length from the Panel Report, the Appellate Body agrees that “the SCM Agreement and Article VI together define, clarify and in some cases modify the whole package of *rights* and obligations of a potential user of countervailing measures”.

Turning to the object and purpose of the WTO Agreement, the Appellate Body argues that the fact that Article VI of the GATT 1947 could be invoked separately from the Subsidies Code does not mean that Article VI of the GATT 1994 can be applied independently of the SCM Agreement in the context of the WTO: “The authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system”. The Multilateral Trade Agreements are “integral parts” of the WTO Agreement; the DSU “establishes an integrated dispute settlement system which applies to all the covered agreements, allowing all the provisions of the *WTO Agreement* relevant to a particular dispute to be examined in one proceeding”.

In this context, Article 32.3 provides that the dividing line between the application of the GATT 1947 system of agreements and the WTO Agreement is the date on which the application was made for the countervailing duty investigation or review. Thus,

“the Uruguay Round negotiators expressed an explicit intention to draw the line of application of the new *WTO Agreement* to countervailing duty investigations and reviews at a different point in time from that for other general measures. Because a countervailing duty is imposed only as a result of a sequence of acts, a line had to be drawn, and drawn sharply, to avoid uncertainty, unpredictability and unfairness concerning the rights of states and private

parties under the domestic laws in force in when the *WTO Agreement* came into effect" (at 19).

The Appellate Body notes that the drawing of this line need not harm the interests of the Philippines, as the Philippines had "legal options" available to it "and, therefore, was not left without a right of action as a result of the operation of Article 32.3 of the *SCM Agreement*". For example, the Philippines could have sought dispute settlement under the provisions of the Tokyo Round Subsidies Code, or indeed under Article VI and XXIII of the GATT 1947.

Evaluation.

1. The most striking thing about this Report is the almost total confusion as to the rule of interpretation to apply. Of course, like *Cotton Underwear*, the Appellate Body goes through the mechanics of Articles 31 and 32 of the Vienna Convention by quoting the text, examining the context and then the object and purpose. However, that is the end of the story.

Article 28 of the Vienna Convention is quoted, but its relevance to the reasoning is not made clear. Then, on at least three occasions the Appellate Body refers to what the drafters or the authors of the WTO Agreement had intended; no reason is given as to why the intentions of the drafters are of any relevance; no evidence is adduced to support this inference of intention. This may be merely a short hand reference for the text. But "the intention of the drafters" is used to add to the text of Article 32.3 words that are simply not there; while the text reflects the intention of the authors, that very intention is used to add to the text words that had been left out. Finally, although the removal of a particular provision was held to be of (almost determinative) importance in *Cotton Underwear*, the Appellate Body casually dismisses this piece of potential evidence as to intent as irrelevant.

2. The *political* direction of the decision is no less curious. The Appellate Body notes that fairness concerns did not arise as the Philippines had recourse to Article XXIII as well as to the Subsidies Code dispute settlement procedure; it could also have recourse to Article 21 of the *SCM Agreement*. The Appellate Body had just

finished talking about the integrated dispute settlement procedure of the WTO, so it cannot have been ignorant of the differences between the dispute settlement mechanisms of the WTO and the GATT. The only reason the Philippines was in the WTO and not before the Subsidies Code dispute settlement procedure was that the Subsidies Code dispute Settlement procedure, though legally functional, had been moribund from inception ⁽¹⁰⁰⁾. Five out of five panel reports under the Subsidies Code had been blocked, an unenviable record for the Tokyo Round Codes ⁽¹⁰¹⁾. To have refused to deal with the substantive complaint of the Philippines was effectively to deny the Philippines redress.

3. The greatest weakness of the Appellate Body Report is in its interpretation of Article 32.3. Let us examine briefly the steps that the Appellate Body took to arrive at its decision:

a) Article 32.3 provides that the SCM Agreement is applicable only to investigations begun after the entry into force of the WTO Agreement;

b) Article 10 provides that countervailing duties must be applied in accordance with Article VI of the GATT and the SCM Agreement;

c) Article 32.1 provides that “[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement”;

d) countervailing duties are the conclusion of an integrated investigation system; and

e) the WTO Agreement is an integrated system, providing a package of *rights* and obligations for the potential user of countervailing duties;

Therefore.

“this Agreement” in Article 32.3 means “this Agreement *and* Article VI of the GATT 1994”.

The conclusion does not follow the premise. For example, the fact that countervailing duties are the conclusion of an integrated

(100) BEHBOODI, *op. cit.*

(101) HUDEC, *op. cit.*

process does not add to the analysis in any way: the duty could be discriminatorily applied and therefore fall outside the WTO Agreement, without in any way impugning the integrity of the investigation process. The duty itself may be higher than that permitted by the SCM Agreement, again without in any way bringing into question the investigative process. Article 32.1 is not helpful in determining the scope of application of Article VI, as it is a general prohibition on unilateral measures taken outside the WTO Agreement. That the drafters thought it necessary to use a conjunctive in Article 10 and mention Article VI could just as well be an indication that they did not expect Article VI to be read into Article 32.3, which specifically does not mention Article VI.

Finally, there is nothing in the "integrated" nature of the SCM Agreement that would automatically be a bar to the application of specific provisions of the GATT independently of the Multilateral Trade Agreements. Indeed, unlike the Panel, the Appellate Body did not consider that the possibility of different interpretations of Article VI with or without the guidance of the SCM Agreement would lead to an "absurd or unreasonable" result.

In short, and to be generous to the Appellate Body, the final conclusion was not mandated by the legal provisions.

4. Faced with a question that was not likely to arise again before the WTO and a dispute in which the interests of the disputing parties did not require a careful political balance, the Appellate Body took the opportunity of developing the framework of the WTO further in the direction of a comprehensive system of laws. The persuasive force of *Coconuts* lies in the single statement that the "authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system". *Coconuts* elevated that intention into a key principle of interpretation.

B. *Restructuring the negotiated balance.*

In the previous sections I have suggested that on two levels the Appellate Body has shown a keen understanding of the two principal objectives of the dispute settlement mechanism, indeed the entire legal structure, of the WTO. Its early framework reports are

broad expressions of interpretive principles, intended to set the dispute settlement mechanism on a sure and a predictable legal footing; its "confidence-building" reports address diverse political interests that require reassurance that the WTO will be more sensitive to them than the old GATT. Trade liberalization as an absolute good is rarely mentioned, and then often in reference to rights of private parties or in full recognition of the underlying balance of rights and obligations of the parties.

It was inevitable that, given the right circumstances, the organs of the WTO would wake up to the *raison d'être* of the WTO itself: trade liberalization. None of the earlier cases had given much scope to the Appellate Body to be *activist* in this area, to do for governments what they cannot do themselves, given the enormous protectionist pressures they are usually under ⁽¹⁰²⁾. *Periodicals* presented just such an opportunity. Faced with a dispute that pitted two developed countries against one another, a seminal issue (the scope of application of the GATT to services), an industry in which protectionism is the norm rather than the exception and legal rights and obligations that reflected protection rather than liberalized trade, the Appellate Body proceeded to remedy the situation: the negotiated balance was altered to advance the broader objective of trade liberalization. The question that this paper is concerned with is the extent to which that approach is likely, in the long term, to serve the objectives set out above.

The Appeal.

At issue was the GATT-consistency of two Canadian measures concerning periodicals. The first imposed an 80% excise tax on the value of all advertising directed to the Canadian market in "split-run" magazines; magazines that are *printed* in Canada, but whose content is not original to Canada, that is, more than 80% of the magazine has already appeared or will appear in a different market. The second impugned measure concerned the application by Canada Post of lower "commercial Canadian" postal rates to domestically

(102) Jackson and Matsushita; quote Trimble.

produced periodicals than to imported periodicals, including additional discount options available only to domestic periodicals. The Panel had found that the excise tax was not consistent with Article III:2 of the GATT, but that the maintenance of the Canada Post scheme was consistent with Article III:8 of the GATT.

The Report.

The principal question in the appeal was the applicability of Article III:2 to the measure in question. The impugned tax was a tax on the value of advertising directed to the Canadian market, calculated on a per issue basis, contained in each "split run" issue. Advertising services had been expressly excluded by Canada from its Schedule of Specific Commitments under the General Agreement on Trade in Services ("GATS"). Nothing in Article III:2 of the GATT expressly required compliance in respect of regulations concerning the sale of advertising, and certainly not in respect of products physically produced in the territory of the country imposing the tax.

The Appellate Body concludes that the GATT was applicable to the tax at issue. First, it notes that the "title" of the relevant provision of the Canadian *Excise Tax Act* reads "Tax on Split-run Periodicals", not "tax on advertising". Likewise, the Summary of the Act identified the tax as a tax "in respect of split-run editions of periodicals". Second, the Appellate Body observes,

"a periodical is a good comprised of two components: editorial content and advertising content. Both components can be viewed as having services attributes, but they combine to form a physical product — the periodical itself" (at 17).

Third, the Appellate Body points out, the measure in question was a companion piece to an import prohibition on split-run magazines; since it had the same "objective and purpose", it should be "analyzed in the same manner".

The Appellate Body observes that an examination of the tax in question

"demonstrates that it is an excise tax which is applied on a good, a split-run edition of a periodical, on a 'per issue' basis. By its very structure and design, it is a tax on a periodical. It is the

publisher, or in the absence of a publisher resident in Canada, the distributor, the printer or the wholesaler, who is liable to pay the tax, not the advertiser" (at 18).

Having made this finding, the Appellate Body goes on to find that it "cannot agree with Canada that this internal tax does not 'indirectly' affect imported products". The Appellate Body reiterates the "well established" principle that no trade effects need be shown to show inconsistency with Article III. Rather, the fundamental purpose of Article III is to ensure "equality of competitive conditions between imported and like domestic products". The Appellate Body then finds that any measure that

"indirectly affects the conditions of competition between imported and like domestic products would come within the provisions of Article III:2, first sentence, or by implication, second sentence, given the broader application of the latter" (at 19) [emphasis added].

The key finding of the Appellate Body in this case was, however, with respect to the relationship between the GATT and the GATS. The Appellate Body simply repeats and reaffirms the finding of the Panel that obligations under the GATT and the GATS can co-exist and that one does not override the other. The Appellate Body does not further address the issue raised by Canada with respect to the *balance* of rights and obligations that must be maintained when applying the GATT to areas that might otherwise be covered by the GATS. The Appellate Body concludes that "it is not necessary and, indeed, would not be appropriate in this appeal to consider Canada's rights and obligations under the GATS".

The Appellate Body then considers the issue of "like products" and Canada's argument that the Panel had erred in its analysis. After examining the analysis of the Panel, the Appellate Body concludes that there was inadequate factual analysis and a lack of proper legal reasoning and that the Panel "could not logically arrive at the conclusion that imported split run periodicals and domestic non-split-run periodicals are like products. The Appellate Body nevertheless proceeds to examine the issue under Article III:2, second sentence.

The Appellate Body observes that

“split-run periodicals compete with wholly domestically produced periodicals for advertising revenue, which demonstrates that they compete for the same readers. The only reason firms place advertisements is to reach readers. A firm would consider split-run periodicals to be a acceptable advertising alternative to non-split-run periodicals only if that firm had reason to believe that the split run periodicals themselves would be an acceptable alternative to non-split-run periodicals in the eyes of consumers” (at 26).

Noting the oft-stated policy objectives of the Government of Canada to protect its magazine industry, the Appellate Body has little difficulty in finding that the measure in question is inconsistent with Article III:2 second sentence.

The Appellate Body then turns to the issue of whether the commercial discount rates offered by Canada Post were consistent with Article III:8. The Panel had found that since Canada Post was a Crown corporation, its discriminatory treatment of Canadian and non-Canadian magazines was inconsistent with Article III:4. However, it had noted that for the very same reason that it found an otherwise private corporation a government entity, the subsidies provided by the Government of Canada to Canada Post should be seen an internal transfer of funds, and so the commercial discount rates were in effect direct subsidies consistent with Article III:8 of the GATT.

The Appellate Body notes that the wording of Article III:8 “helps to elucidate the types of subsidies covered by Article III:8(b) of the GATT 1994”. It then argues that its reading is supported by the context of Article III:8(b), “examined in relation to Article III:2 and III:4 of the GATT 1994”. Finally, the Appellate Body concludes that “the object and purpose of Article III:8(b) is confirmed by the drafting history of Article III” and proceeds to refer to such negotiating history. The Appellate Body then finds that the Panel had incorrectly interpreted this provision and reverses its findings and conclusions in this respect.

Evaluation.

1. As with *Coconuts*, the most striking aspect of the Appellate Body Report relates to the question of the applicable rules of

interpretation. The Appellate Body does not discuss the question until the last issue and then just barely; the analysis indicates at best a shallow understanding of such rules. Again, there is an inconsistent approach to the relevance of the negotiating history, this time used to identify the "object and purpose". The problems with such an off-hand approach have been identified above and do not require additional analysis.

2. Of course, the problem with the approach of the Appellate Body is not in form but in substance: one wonders whether the absence of any reference to the Vienna Convention stems from a concern that quoting Articles 31 and 32 might cast in bold relief the Appellate Body's marked departure from its own oft-repeated guiding principles.

To understand the difficulty, it may be useful to examine, in outline form, the argument of the Appellate Body, noting that the split-run magazines in question are *printed* in Canada from editorial content beamed electronically into Canada and advertising sold there:

a) advertising and editorial content combine to form a physical product; and

b) a discriminatory tax applied to one of these elements is a measure that "indirectly affects" the conditions of competition of the imported and domestic like products;

Therefore:

c) a tax on advertising services calculated on the basis of value of advertising in each issue of a periodical is governed by Article III:2 of the GATT.

The conclusion would follow if Article III:2 provided for examination of taxes that may "indirectly affect" such conditions of competition. That is not, however, the actual *text* of the Article, which reads:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products".

The Appellate Body thus widens the direct or indirect *application* of a tax to include direct or indirect *effect*. The problem in this instance lies not in the direction of the interpretation but the near total absence of analysis as to why that is to be the preferred approach. By ignoring its own rules of interpretation and not even quoting the applicable legal provision, the Appellate Body appears to be engaged in a clandestine enhancement of the scope of application of Article III.

3. The Report's difficulties are compounded by the refusal of the Appellate Body to examine the relationship between the GATS and the GATT in the light of another of the Appellate Body's stated rules of interpretation: effectiveness. The clear right of the Members of the WTO to exclude certain areas from the application of the GATS is now open to question, if it has not already been effectively rendered meaningless by the wholesale application of Article III:2 to any tax or measure *on a service* that could "indirectly affect" a good. If a tax on advertising in magazines is covered by Article III:2, what about taxes or regulations on advertising on television, or on billboards? What about the regulation of trucking, shipping, or airline services? All of these regulatory measures, in one way or another, "indirectly affect" a good in international trade; many of these services were pointedly excluded from the application of the GATS, exclusions that, much like the exclusion of advertising services from Canada's Schedule of Specific Commitment, were made in return for serious concessions given in other sectors.

Expanding the scope of application of Article III is not, therefore, a simple "goods" matter, to be done only in relation to the "object and purpose" of Article III itself. Rather, the question goes to the core of what the Appellate Body itself has identified as key elements of the new legal order that all legal provisions must be given their proper effect and that the WTO Agreement is not just about "obligations", but provides also for rights for the Members of the WTO.

4. It would appear that one of the most important factors in guiding the Appellate Body to its decision was the strongly protectionist statements of the Government of Canada in relation to its

cultural industries. The desire of the Appellate Body to do away with protectionism everywhere, however admirable and however in accord with the object and purpose of the WTO writ large, must nevertheless be balanced with the need of the new legal order, as identified above, for appropriate legal justification for conclusions that however intuitively correct, must nevertheless be sustainable within a judicial mechanism. Such legal justification is necessary to identify the reasons for departure from past practice — whether in the application of a rule of interpretation or in the interpretation of a substantive provision — but also where, as in this case, a particular interpretation for one set of rights and obligations has the potential of restructuring the balance of rights achieved elsewhere, in relation to another set of legal provisions.

Periodicals was, in this context, less than successful in following through with the promise seen in the earlier Reports of the Appellate Body.

Conclusion.

I set out to determine the extent to which the Appellate Body of the WTO has been successful in achieving its twin objectives of predictability and security. I noted that these are but elements of a broader and much more fundamental concept, legitimacy, without which the very idea of a legal order would be incomprehensible. I then suggested that legitimacy in a legal order is attained through a dialectic in which the interpreters of the legal text essentially engage in a process of persuasion to justify their legal decisions before the interpretive community that receives such decisions and that is responsible (or at least, some parts of which are responsible) for the implementation of such decisions.

This process of persuasion is what is called legal reasoning. To the extent, then, that the new legal order purports to have legitimacy as a legal order, and to the extent that it is departing from a fundamentally political forum based on negotiations and compromise, rather than adjudication and enforcement of rights, the interpreters, or judges, of the system must speak in a legal language: this not only ensures a measure of predictability, but also gives confi-

dence to the participants in the process that the legal order they have created functions and serves their interests well.

In discussing the reports of the Appellate Body, three of the early reports were identified as seminal in building confidence for the system. The Appellate Body did so by adapting its approach better to reflect the new membership of the interpretive community that differed so significantly from the audience before whom early GATT panels had to justify their decisions. The slight retrenchment in *Wool Shirts* further underlined the dialectical nature of the process, as the Appellate Body responded to the arguments raised by India with remarkable sensitivity to the balance that had to be struck between rights and obligations to further aid the legitimacy of the WTO for *all* Members.

The other cases, which I identified as “framework cases”, presented a more varied mix. *Japanese Liquor Tax* was the most comprehensively argued of the three and presented the fewest difficulties, both logically and substantively. *Coconuts*, as I argued, presented a great many analytical challenges, but in the end, served an important function to advance the interpretive cohesion of the WTO Agreement.

Periodicals presents difficulties of its own. Without doubt, it is a key framework report, in setting out the relationship of the GATT to the GATS and, perhaps more important, expanding the scope of application of Article III:2 to cover all tax measures that indirectly *affect* the trade in goods. Given the importance of the message it carried, the Report should have been more ably and more comprehensively argued — or *justified*. Just as the casual analysis of *Cotton Underwear* led to the Indian appeal in *Wool Shirts*, we can expect *Periodicals* to lead to further challenges that, given the subject matter and the potential scope of Article III:2, are likely to prove more intractable than the problems related to the ATC and discussed in the earlier cases.

To some extent, that has already happened. The latest Report of the Appellate Body, in the *EU Bananas* case, has just been issued. The report is so comprehensive that it is not possible in this paper to examine it in any detail. What is immediately striking about that Report is its level of detail, which is prodigious, and structure,

which now more closely follows that of panel reports. It is also interesting to note that although for the most part it upheld the findings and conclusions of the Panel, the Appellate Body did not hesitate to overturn some findings despite the Panel's obvious and strong attempt at "appeal-proofing" its report in over 130 ages of legal analysis. One of the major issues discussed in the case was the relationship between the GATT and the GATS. Despite the verbal inflation noted above, the Appellate Body still does not do the subject justice.

It is, of course, still early to prognosticate about the future of the WTO and the Appellate Body. Its first steps were promising because they recognized the function that a legal order serves, and the function that a judicial body within that legal order must serve to maintain the legitimacy of that order. The legal order of the WTO will not be well served if, at this stage of its life, the Appellate Body were to abandon the search for legitimacy in favour of a doctrinal search for liberalized trade.

MASSIMO PANEBIANCO

COMMENTS

The task of speaking here today is tremendously facilitated by the two introductory reports by our president Professor Mengozzi and by our colleague Prof. Venturini. Prof. Venturini, who is a renowned specialist in international trade law and in the GATT-WTO system, has provided us with further testimony to her expertise by presenting a synthesis of legal experience in international trade.

I am not an expert in the field of international trade, therefore I will limit myself to commentary on the distinct but substantially complementary reports by Baroncini and Behboodi. These two studies are dedicated, respectively, to the preliminary phase of the dispute settlement system, which is based on a direct consultation procedure, and to the Appellate Body, with which the GATT/WTO system has started its first three years of experience.

As Venturini so rightly stated, we have before us a body of WTO "case law", an expression which is to be understood in light of the two reports. In reality, in the second the idea is put forth that in these first three years, an international interpretive community has evolved. Behboodi, in examining the first three years of Appellate Body case law, points out that typically, here, the diplomat assumes the role of the jurist and attempts to demonstrate the development of an interpretive *idem sentire*. Baroncini, on the other hand, whose solid legal training and appreciable quality is demonstrated by the quality of her work, focuses on the concept of the rise of a sub-system of judicial diplomacy (as opposed to diplomatic judgments). My aim is to read these two contributions together, as they reflect the mixed nature of the WTO system which is entrusted in part to jurists who are called upon to operate by the rules of legal logic, of

the interpretation of treaties and all else deriving from the treaty through integration and interpretive practice. Moreover, the WTO system, having the aim of creating not only a substantive body of international trade law but also a "procedural" or judiciary system, has continually had to reckon with the methods and concepts of traditional civil procedure applied by every judge — civil, commercial, administrative, or otherwise — on a daily basis. Hence a double system, one of substantive law, the other of procedural law.

It must be emphasized here that within the WTO system, a third organizational element appears side by side with the judges of first and second instance: the Dispute Settlement Body, an exclusively diplomatic entity whose task is to approve the reports from the first and second instance, and above all, to monitor their implementation. Therefore, the procedural sub-system is trilateral; on the one hand, it clears the way for the jurists at the first and second levels, and on the other, it functions as the *exequatur*, overseeing implementation and thus effectuating a "quality control" of the activated mechanisms.

These international trade disputes, as disputes between States, have a global aspect, as Professor Mengozzi pointed out, because as a rule, these are trade disputes between States belonging to distinct economic areas. This can be discussed in bipartisan terms: industrialized states and developing states. One may speak of poles: the American pole (NAFTA: United States - Canada - Mexico); the Community pole (the European Union represented as a single entity); the Asian pole (especially Japan - Korea - Indonesia). However, other areas are represented, such as MERCOSUR (Brazil and Argentina in particular), and Central America. In fact, one of the most interesting cases set the European Community, as defender of the needs of African countries linked to the ACP system, in opposition to a group of Central American states protected by the United States. Thus, statistics indicate both quality and quantity of disputes, the inter-area geographic distribution and, in final analysis, the position of the parties to the dispute.

A word about the traditional classifications utilized by jurists through the first and second stages and (at times) through preliminary procedures. In seeking to prevent the dispute from becoming

magnified, these classifications favor agreement between the parties to turn to the Dispute Settlement Body. As I mentioned, the Dispute Settlement Body approves and adopts reports and monitors their implementation. Thus, it brings the elements of civil procedure to the attention of the diplomats, because the Dispute Settlement Body is a plenary body composed essentially of representatives of State at the ministerial or diplomatic level.

All of the elements of civil procedure are present. What, then, in the strict sense, is a dispute, and what, in the strict sense, is an agreement within the meaning of WTO law? There is a right to action and a right to a panel, and this right is conditional and proceduralized. The right to a panel arises not upon the first request, but on the second. In this way, disputes are "filtered" so as to prevent Geneva from becoming a haven for jurists and lawyers. In this sense, self-restraint by the parties and the wise policy of the Dispute Settlement Body work to avoid the "inflation" of a dispute. This is evidenced by the fact that 80% of disputes have never made it to a panel and thus to an official decision. Upon the second request, however, if a dispute is turned over to a panel, there is an inescapable right to action, and here the rules of procedure are linked to the rules of the autonomous legal transactions of the parties. The parties may drop the dispute; they may resolve, or contribute to the resolution of the dispute; they may reach a friendly settlement. But even here in this first phase, the traditional elements of procedure are present: arguments are heard from both sides and the object of the dispute is defined. Two requests for a panel, both having the same object, may be entered simultaneously, or the request may be made again for a new panel to look at an issue on which a previous "ruling" has been made. Here, again, the diplomat must play the part of jurist, and must engage in judicial diplomacy with the aim of "deflating" the contentious procedures, thus bringing under control, with the consensus of all, the possible expansion of the conflict.

When it comes time, then, to identify the positions of the parties to the dispute, the *causa petendi* or the *petitum* is, of course, examined. And this issue increases in importance when the request and the positions of the parties are referred to the panel or the

Appellate Body. Also here, the Dispute Settlement Body in part adopts the report, and in part hears the initiatives of the dissatisfied states.

At the intermediate stage, each state has the right to make its own statement before the Dispute Settlement Body; at times, interpretive statements made in the typical diplomatic manner may be felt neither as legal statements nor as claims of exceptions, but rather as true and proper reservations. Sometimes the motive for appeal takes on the form of a reservation within the meaning of international law, reservations regarding not only the merits but also the possibility of enforcement of the eventual panel report (or, in other words, the judgment) which is unfavorable to one of the disputing states.

What's more, once the appellate phase is completed, the central question of international trade law jurisdiction arises: is the decision enforceable law or not? If the response is, simultaneously, yes and no, then whenever implementation is carried out, how is it to occur? The Appellate Body indicates the means of implementation, and the treaty consents a reasonable period of time for a report to be implemented. But implementation must be compatible with the relevant national system and thus must be "coercive", or else, it must be self-implemented and therefore founded upon the convictions of the losing party against whom the report is to be enforced?

No one more than the European Community (in the famous banana case referenced above) has held its own right to be self-implementation. In this case, it is collective self-implementation, implying implementing regulatory measures by one group of states, recognized as a Community, in harmony with another group of states — the ACP.

Therefore, the following question is to be answered: the right to action in the WTO system, which is clearly characterized by a right to a panel or Appellate Body report, is also to be interpreted as including a right to enforcement? Or are WTO provisions on the right to action made for alternative implementation more suitable to the rules of traditional international law? Then, all results and procedures must be moulded from the diplomatic reasoning which tends towards amicable settlements also in the implementation

stage. Naturally the question may be expressed in a more provocative and sophisticated manner, regarding the existence of a *res judicata* in the context of the WTO system. During these first three years, the same questions have been posed by jurists, technocrats, diplomats, and politicians alike, all important members of the interpretive community. The original GATT system, it is pointed out, was an exclusively diplomatic system; the WTO system, on the contrary, is a combination of the technical-legal, diplomatic and political-ministerial, because in final analysis, any question may be raised at the Ministerial Conference and withdrawn from the Dispute Settlement Body for reasons of its highly political nature, not assessable beforehand.

Having examined this issue as presented by Baroncini and Behboodi, we now move away from procedure and come to the issue of substance and how does this play out in case-law? If we could tend to the combination of two notions, it could be said that the WTO dispute settlement system assumes a form of a right to assessment and of a duty to act in concert. The legal system has taken significant steps forward in the area of legal assessment, but "assessment" by nature is a logical exercise comprising the arguments of all parties, yet it does not require the consent of the subjects to which it is directed. Legal certainty in international law, in a technical-legal sense, exists only in the most simplistic and obvious form of interpreting a rule and highlighting a fact. The national judge, who operates under other premises, may make an authoritative pronouncement when assessing a case; these "commercial judges" may not. The trilateral system needs, for the approval of the report and to oversee the procedure, of a concerted effort or a consensus of all. This concertation, this act in concert, is different from the assessment, because it is a consensual assessment, and thus, by definition, it is not an authoritative assessment. Therefore, in a general-theoretic sense, it is a system of assessment - concerted effort, a system of consensual assessment.

But Professor Mengozzi has, since the beginning, indicated that there are even more pressing theoretical questions at issue. For instance, how does this mini-legal system created in Geneva fit into the scheme of general international law? Is it conventional law to be

applied "*tout court*" although with integration by customary conventions, interpretive use and legal practice? Or is it something else still — something which, as Professor Mengozzi points out, belongs to the broader category of flexible law, the law of persuasion or the so-called "soft-law" which is a mixed system of strong and weak law?

But if the system is soft law, what are the formal elements that permit us to identify the normative origins of the sources? Each system of soft law must have two properties: it must be a law of reason, because if it were not a law of reason but only a law of will, there would be no soft law by definition. Thus each rule of soft law must, in substance, recall a rule of reason, a rule which is a statement or expression of reasonableness, and it must have a fundamental consultative and conciliatory character. But each rule of soft law must, in combination or alternately, be an expression of legal recommendations; that is, an expression of what a large part of international (and organizational) experience emphasizes regarding the law of recommendations and resolutions.

The WTO sub-system utilizes both elements: the reports of the panels and Appellate Body are essentially the expression of legal "reasonableness", they are the results of a legal-logic activity. On the contrary, the activity of the Dispute Settlement Body, of this great assembly of more than 100 delegates who operate by consensus and on recommendations, adopts the reports, monitors implementation and recommends measures.

Professor Venturini raises a final element: if the system fails and is not implemented, a return to the rules of self-help and individual or collective countermeasures is possible. What is then the rule capable of closing the system? It is no accident that after three years of existence no concrete experiences have materialized in this regard, perhaps out of a fear never openly expressed of the insufficiency of the DSU rules on this subject. However, the problem cannot be avoided, and thus we have to face it: the WTO system must be reviewed on this rather delicate point. Implementation must be monitored, the reasonableness of the time frame for implementation verified, and the congruity of measures and eventual individual countermeasures permissible must be evaluated.

Finally, I would like to call attention to the question of the relationship between the various orders. Global, or globalized law — such as the relationships between large economic and monetary areas — entails regulation at three levels at least: the general international order, regions or groups of states (as in the case of Community law), and national legal orders. How does this tripartisan relationship function and how is it manifested before the Dispute Settlement Body? Let's take the simplest aspect first: national law's resistance to pressure from the WTO. When may a dispute that is raised before a national judge be taken to the WTO? Two situations have been examined, both by India, a sort of ticking bomb within the WTO with a proven knack for legal subtleties and for provoking reaction within the WTO. India's representatives noted the requirement that local legal and administrative remedies be exhausted before a state may espouse the claim of discrimination, injury or damage caused to one of its enterprises by the administrative measures of another state. Furthermore, it remarked that the constitutionality of national law may not be contested within the WTO, and that no state may dictate to another state how to redress its administrative or legislative behavior.

But there is another profile: in reality, each organized economic and monetary area of the world, from Europe to South America, to North America and Africa, is endowed with its own dispute settlement system, including a system to resolve trade matters. Some of these permit a choice of forum between the WTO and their own conventional instruments; others, such as in the NAFTA system, provide for the possibility of "opting out". And here again is clear proof of the benefits of self-restraint. Only the most important disputes (cases where the issue is not intra-area or intra-system, but rather between two or more organized trading systems and thus two or more areas) then are brought to this global judicial summit.

Baroncini and Behboodi bring to light numerous observations concerning not only the examination of dispute settlement during the first three years, but also important questions of substance and procedure. If I may say a final word, I would say that the WTO Dispute Settlement System is one of many pages of institutional soft law, that is, soft law of the post 1989 world, which brings about so

many new organizational mechanisms and procedures assembled *ex novo*. However, I would like to make a comforting remark: the WTO is the "little darling" of the G-7 or G-8; but large-scale disputes which are financial, monetary, social and political, or military-strategic in nature are not brought to Geneva, but rather are enacted before the high commanding body of so-called global law. Let me point out that on the occasion of the 1994 Naples session of the G-7, the then Italian Minister of Industry and G-7 president, who was an illustrious professor of this University (and even I bow to this millennial institute) had called a press conference with the aim of creating a consensus on early implementation of the WTO Agreement. Journalists from all over the world turned out in the Bourbon seat of the "Palazzo Reale". At the last minute, around 2:00 p.m., the press conference was cancelled because the seven were unable to arrive at a consensus. This should not be a disappointment to us. After a few years, as President Mengozzi reminded us, the attitude of the United States, justifiably cautious at the time, was finally transformed, becoming even solicitous, acting as an impetus for the dawn of the crowning success of this legal experience. Thus, we here today are enlightened, and the two papers I had the pleasure of reading interested me profoundly. I extend my personal congratulations and admiration to the authors, especially to Ms. Baroncini, for their excellent work.

III.

THE LIMITS OF THE WTO SYSTEM

MICHELE VELLANO

FULL EMPLOYMENT AND FAIR LABOUR STANDARDS IN THE FRAMEWORK OF THE WTO (*)

SUMMARY: Introduction. — PART ONE - THE PROMOTION OF FULL EMPLOYMENT AND THE REGULATION OF FAIR LABOUR STANDARDS: FROM THE HAVANA CHARTER TO THE WTO. — 1. The Havana Charter: an example to be followed. — 1.1. General remarks. — 1.2. Employment regulation. — 1.3. Fair labour standards regulation. — 2. The problems of full employment and fair labour standards in the present international trading system. — 2.1. Employment policy and fair labour standards in a global economy: strong apprehensions. — 2.2. Current limits to employment regulation in the framework of the WTO. — 2.3. Fair labour standards and the WTO: what kind of relationship? — PART TWO - FUTURE PERSPECTIVES: BOTH BROAD AND NARROW COOPERATION. — 3. The Ministerial Declarations of Singapore and of Geneva. — 3.1. New elements. — 3.2. Content. — 4. Horizontal and vertical cooperation. — 4.1. Horizontal cooperation with the ILO. — 4.2. Vertical cooperation with the European Community, NAFTA and MERCOSUR. — Conclusions.

Introduction.

The provisions of the General Agreement on Tariffs and Trade of October 30, 1947 (GATT 1947), entered into force on January 1, 1948, were originally designed to regulate the foreign trade policies of its Member States without seeking to harmonize or even condition the various national trade policies.

The first attempt at harmonization of the two types of trade policy occurred during the Tokyo Round negotiations (1973-1979) ⁽¹⁾, which led to the signing of the Agreement on Technical

(*) The present work is the English version, with some modifications, of the article "*Le plein emploi et la clause sociale dans le cadre de l'OMC*", published in *Revue Générale de Droit International Public* (Ed. Pedone - Paris), 1998, n. 4.

(1) See D. CARREAU, *Les négociations commerciales multilatérales au sein du GATT: le Tokyo Round (1973-1979)*, *Cahiers de Droit Européen*, 1980, pp. 145-176.

Barriers to Trade, on a subject that, by definition, carried implications for national trade policies.

Other important sectors, previously falling within the competence of each State, were regulated at an international level during the Uruguay Round negotiations (1986-1994) ⁽²⁾, in particular with the Agreement on Trade-Related Investment Measures, the Agreement on Trade-Related Aspects of Intellectual Property Rights, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Agriculture and the General Agreement on Trade in Services.

In general there is a tendency to extend the reach of the international competence to more and more sectors which traditionally fall within the exclusive duty of the States, and by so doing, increase the issues which may be object of international negotiations ⁽³⁾.

(2) There are numerous contributions on the Uruguay Round and the WTO. For a more complete bibliography, see: Società Italiana di Diritto Internazionale, *Diritto ed organizzazione del commercio internazionale dopo la creazione dell'Organizzazione Mondiale del Commercio - Atti del Convegno di Milano*, Napoli, 1998; see also, J.J. JACKSON and A.O. SYKES (eds), *Implementing the Uruguay Round*, Oxford, 1997; Société Française pour le Droit International, *La réorganisation mondiale des échanges (problèmes juridiques) - Colloque de Nice*, Paris, 1996; J. Croome, *Reshaping the World Trading System - A History of the Uruguay Round*, Geneva, 1995; T. FLORY, *Remarques à propos du nouveau système commercial mondial issu des Accords du cycle d'Uruguay*, *Journal du Droit International*, 1995, pp. 877-891; A. COMBA, *Il neo-liberismo internazionale - Strutture giuridiche a dimensione mondiale. Dagli Accordi di Bretton Woods all'Organizzazione Mondiale del Commercio*, Milano, 1995, pp. 229-269; G. SACERDOTI, *La trasformazione del GATT nell'Organizzazione Mondiale del Commercio*, *Diritto del Commercio Internazionale*, 1995, pp. 73-90; *Uruguay Round: GATT/WTO: Symposium*, *International Lawyer*, 1995, pp. 335-511; J.H.J. BOURGEOIS, F. BERROD, E. GIPPINI FOURNIER (eds), *The Uruguay Round Results: a European Lawyers' Perspective*, Brussels, 1994 and A. BEVIGLIA ZAMPETTI, *L'Uruguay Round: una panoramica dei risultati*, *Diritto del Commercio Internazionale*, 1994, pp. 825-842.

(3) See F. ROESSLER, *Diverging Domestic Policies and Multilateral Trade Integration*, J. BHAGWATI and R.E. HUDEC (eds), *Fair Trade and Harmonization*, vol. 2, Cambridge Massachusetts, 1996, pp. 21-25; J.H. JACKSON, *The World Trade Organization and the Sovereignty' Question*, *Legal Issue of European Integration*, 1996, pp. 179-187; T.J. DILLON, *The World Trade Organization: a New Legal Order for World Trade?*, *Michigan Journal of International Law*, 1994/95, pp. 349-402

The Ministerial Declaration of Singapore of December 13, 1996 and the Ministerial Declaration of Geneva of May 20, 1998 ⁽⁴⁾, following the first and second Ministerial Conferences of the new World Trade Organization (WTO) — the international organization which replaces the uncertain and temporary GATT 1947 institutional framework ⁽⁵⁾ —, confirm this trend by identifying new areas for future negotiations which until present have remained within the exclusive competence of States. These areas include, in particular, environment, competition policy and investment.

Looking further ahead, it is possible that other subjects, such as corporate law, immigration, monetary policy, public deficit, economic development and stability as well as full employment and fair labour standards, will be placed on the WTO negotiating agenda.

The ultimate goal, evidently, is to completely overcome the distinction between national and foreign trade policy in the various States by placing each aspect of the production and sale of goods and the provision of services on a global bargaining table ⁽⁶⁾.

Returning to the present situation, it is easy to understand how the regulation of new sectors on an international level is accompanied by a progressive limitation of national sovereignty ⁽⁷⁾.

and D. CARREAU, T. FLORY and P. JUILLARD, *Droit international économique*, Paris, 1990, p. 81.

(4) Ministerial Declaration of Singapore, 13.12.1996, WT/MIN (96)/DEC/W and Ministerial Declaration of Geneva, 28.5.1998, WT/MIN (98) DEC/1. On the content of these Declarations, see paragraphs 3.1 and 3.2 in the second part of this work.

(5) Nevertheless GATT 1947 is now (integrated with new provisions and known as GATT 1994 or, more simply, as GATT) one of the Agreements administered by the WTO. See M. COCCIA, *Dal GATT 1947 al GATT 1994, Considerazioni generali ed istituzionali*, Società Italiana di Diritto Internazionale, *Diritto e organizzazione del commercio internazionale*, cit., pp. 81-105.

(6) Given the difficulty, or even the impossibility, of drafting in the context of an international negotiation an Agreement on detailed technical rules for each sector, it might be reasonable to expect that minimum standards can be adopted (global harmonization) which highlight the principle of mutual recognition based on the European Community model. This model must, of course, be compatible with the internal organization of the States. In fact, the progressive expansion of matters which are regulated internationally implies legislative and/or administrative powers at local levels (Federal States, Regions, Cantons, etc...).

(7) See: E.U. PETERSMANN, *Constitutionalism and International Organizations*,

The establishment of the WTO as well as the determination of its procedures by majority vote (albeit qualified), is testimony that almost all the States were conscious of the need to create for themselves a structure dedicated to the administration of commitments undertaken in relation to international trade ⁽⁸⁾.

Moreover, the progressive institutional strengthening along with a broadening of powers on the substantive level is an experience which has already materialized successfully, at the regional level, within the European Community.

It must be noted, however, that the present organization of the WTO renders the introduction and regulation of new matters difficult without resorting to specific negotiations. The procedure to amend the provisions of the Agreement establishing the WTO or its annexed Agreements is in fact laborious and difficult to apply ⁽⁹⁾.

Furthermore, the Ministerial Conference and the General Council have the authority to adopt, by a three-fourths majority of the Member States, interpretations of the WTO statute and the annexed Agreements on the condition that the interpretation does not seek, even indirectly, to amend the Agreement concerned.

The rigidity of these procedures highlights the caution with which the States accepted a limitation of their sovereignty in matters of international trade within the WTO framework. It is equally unlikely — although not impossible — that new issues, will be

Northwestern Journal of International Law & Business, 1996/97, pp. 398-469 and W.J. ACEVES, *Lost Sovereignty? The Implication of the Uruguay Round Agreements*, *Fordham International Law Journal*, 1995, pp. 427-442.

(8) While the early rounds of multilateral trade negotiations, up to the Dillon Round in 1961, involved some 20 to 30 countries, the Kennedy Round (1964-67) involved over 60 countries, the Tokyo Round (1973-79) more than 100 countries, and the Uruguay Round (1986-94) had 125 participants. The WTO's membership stands at 132 countries today and this could grow to over at least 160 early in the next century.

(9) Article X of the WTO statute provides that amendments which modify the rights and duties of the Member States, become effective in the States which have accepted them after having been accepted by two-thirds of the Members. The Ministerial Conference may decide, with a three-fourths majority of its members, that an amendment has the effect that a Member State which did not accept it in the time provided is free to leave the WTO or to remain a member with the agreement of the Conference of Ministers.

regulated either by means of amendment or by a particularly broad interpretation of an existing WTO provision.

Confronted with the difficulty of expanding the present reach of the WTO through the institutional procedures described above, one may ask what, both qualitatively and quantitatively, is the margin of interpretation allowed to the bodies charged with the task of regulating the dispute settlement system ⁽¹⁰⁾.

In the past, panels exercised *self-restraint*, limiting themselves to very cautious interpretive criteria and carefully avoiding any divergence from the literal text of the rules under examination ⁽¹¹⁾.

In the course of the Uruguay Round negotiations the dispute settlement system in its entirety was considerably strengthened, and the opportunity to impose on the bodies of the WTO dispute

(10) That is to say, the Appellate Body. There is an ample corpus of works dedicated to this point, and, more generally to the new dispute settlement system. See for example: G. MARCEAU, *Rules on Ethics for the New World Trade Organization Dispute Settlement Mechanism - The Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, *Journal of World Trade*, n° 3, 1998, pp. 57-97; E.U. PETERSMANN, *The GATT/WTO Dispute Settlement System*, London, 1997; J. CAMERON and K. CAMPBELL (eds), *Dispute Resolution in the World Trade Organization*, London, 1997; A. LIGUSTRO, *La soluzione delle controversie nel sistema dell'Organizzazione Mondiale del Commercio: problemi interpretativi e prassi applicativa*, *Rivista di Diritto Internazionale*, 1997, pp. 1003-1085; J.H. JACKSON, *The WTO Dispute Settlement Understanding: Misunderstandings on the Nature of Legal Obligation*, *American Journal of International Law*, 1997, pp. 60-64; A. LIGUSTRO, *Le controversie tra Stati nel diritto del commercio internazionale: dal GATT all'OMC*, Padova, 1996; M. VELLANO, *La Comunità Europea e i suoi Stati membri dinanzi al sistema di risoluzione delle controversie dell'Organizzazione Mondiale del Commercio: alcune questioni da risolvere*, *La Comunità Internazionale*, 1996, pp. 499-527; J.H. BELLO and A.F. HOLMER, *Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits*, *International Lawyer*, 1994, pp. 1095-1104; E. CANAL-FORGUES, *Le système de règlement des différends de l'Organisation Mondiale du Commerce (OMC)*, *Revue Générale de Droit International Public*, 1994, pp. 689-707; P.T.B. KOHONA, *Dispute Resolution under the World Trade Organization: an Overview*, *Journal of World Trade*, n° 2, 1994, pp. 23-47.

(11) Regarding limitations on the interpretive activity of the panels and the Appellate Body, see: S.P. CROLEY and J.H. JACKSON, *WTO Dispute Procedures, Standard of Review and Deference to National Governments*, *American Journal of International Law*, 1996, pp. 193-213 et J.R. CANNON Jr. and K.L. BLAND, *GATT Panels Need Restraining Principles*, *Law & Policy in International Business*, 1993, pp. 1167-1184.

settlement system a *standard of review* ⁽¹²⁾ modeled after that of the American legal system was affirmed. In reality, at the end of the negotiations, the notion of the *standard of review* appeared only in one provision, Article 17.6 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, which covers antidumping. However, it had already been contemplated, in a special Ministerial Decision ⁽¹³⁾, that in the future the *standard of review* might be extended to the interpretation of all of the Agreements administered by the WTO ⁽¹⁴⁾.

The adoption of this interpretive principle, along with the principle of *self-restraint* referred above, further confirms the caution with which States agreed to limit their sovereignty in relation to international trade matters within the WTO framework.

Thus, it is only with difficulty that an eventual expansion of the WTO so as to encompass, for example, full employment and fair labour standards, might occur through this way.

The present uncertainty regarding the status within the WTO framework of the theme of labour ⁽¹⁵⁾ (in its twofold dimension of

(12) Based upon this principle, the panels and the Appellate Body must keep to the reconstruction of facts and the interpretation of law proposed by the administrative or legal bodies of the Member States. In order to deviate from this, they must provide the appropriate legal reasoning.

(13) The Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, according to which: "The standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of Article VI of GATT 1994 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application".

(14) For the moment, on the one hand, according to the provisions of Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the panel is to proceed with an objective evaluation of the questions submitted for its examination, giving primary consideration to the facts, as well as the applicability of the Agreements cited concerning the matter and the compatibility of the contested measures with these Agreements; on the other hand, Article 17 of the Understanding, the Appellate Body is limited to examining points of law regarding the panel report and the legal interpretations it has developed. See G. SACERDOTI, *Il doppio grado di giudizio nella giurisdizione internazionale, Comunicazioni e Studi*, Milano, 1997, pp. 190-204.

(15) On this subject, within the framework of international trade, there are many contributions, including: C. DI TURI, *Liberalizzazione dei flussi commerciali*

full employment and fair standards) in the form of a declaration of

internazionali, norme di diritto internazionale del lavoro e promozione della dignità umana, *Diritto Comunitario e degli Scambi Internazionali*, 1998, pp. 51-88; B.A. LANGILLE, *Eight Ways to Think about International Labour Standards*, *Journal of World Trade*, n° 4, 1997, pp. 27-51; F. MAUPAIN, *La protection internationale des travailleurs et la libéralisation du commerce mondial: un lien ou un frein?*, *Revue Générale de Droit International Public*, 1996, pp. 45-100; E. ROBERT, *Enjeux et ambiguïtés du concept de clause sociale ou les rapports entre les normes de travail et le commerce international*, *Revue Belge de Droit International*, 1996, pp. 145-190; F. WEIS, *Internationally Recognized Labour Standards and Trade*, *Legal Issues of European Integration*, 1996, pp. 161-178; R. HOWSE and M.J. TREBILCOCK, *The Fair Trade - Free Trade Debate: Trade, Labour and the Environment*, *International Review of Law and Economics*, 1996, pp. 61-79; B.A. LANGILLE, *General Reflections on the Relationship of Trade and Labour*, J. BHAGWATI and R.E. HUDEC (eds), *Fair Trade and Harmonization*, vol. 2., Cambridge Massachusetts, 1996, pp. 231-266; V.A. LEARY, *Workers' Rights and International Trade: the Social Clause (GATT, ILO, NAFTA, U.S. Laws)*, J. BHAGWATI and R.E. HUDEC (eds), *Fair Trade and Harmonization*, vol. 2., Cambridge Massachusetts, 1996, pp. 177-230; P. De WAART, *Minimum Labour Standards in International Trade from a Legal Perspective*, P. VAN DIJCK and G. FABER (eds), *Challenges to the New World Trade Organization*, The Hague, 1996, pp. 245-264; M. VAN MARION, *International Business, Trade and Minimum Standards: a Comment*, P. VAN DIJCK and G. FABER (eds), *Challenges to the New World Trade Organization*, The Hague, 1996, pp. 299-306; S. DUFOUR, *La libération des échanges mondiaux et le respect des règles fondamentales en matières sociale: un lien controversé*, *Études internationales*, 1995, pp. 275-289; L. COMPA, *Labour Rights and Labour Standards in International Trade*, *Law & Policy in International Business*, 1994, pp. 165-191; J.M. SERVAIS, *The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress?*, *International Labour Review*, 1989, pp. 219-243; G. VAN LIEMT, *Minimum Labour Standards and International Trade: would a Social Clause Work?*, *International Labour Review*, 1989, pp. 433-448; S. CHARNOVITZ, *The Influence of International Labour Standards on the World Trading Regime: a Historical Overview*, *International Labour Review*, 1987, p. 565-584; S. CHARNOVITZ, *Fair Labour Standards and International Trade*, *Journal of World Trade Law*, 1986, pp. 61-78. From an economic perspective see: M. LUNATI, *Liberalizzazione degli scambi e costo del lavoro: esiste il dumping sociale?*, G. SACERDOTI and G. VENTURINI (eds), *La liberalizzazione multilaterale dei servizi e i suoi riflessi per l'Italia*, Milano, 1997, pp. 165-182 and T.N.J. SRINIVASAN, *International Trade and Labour Standards from an Economic Perspective*, P. VAN DIJCK and G. FABER (eds), *Challenges to the New World Trade Organization*, The Hague, 1996, pp. 219-243. About WTO and fair labour standards see: G. PORRO, *Disciplina del lavoro e commercio internazionale: quali relazioni?*, *Il Diritto dell'Economia*, n° 3, 1998; V.A. LEARY, *The WTO and the Social Clause: Post-Singapore*, *European Journal of International Law*, 1997, pp. 118-122; A. ENDERS, *The Role of the WTO in Minimum Standards*, P. VAN DIJCK and G. FABER (eds), *Challenges to the New World Trade Organization*, The Hague, 1996, pp. 291-297; H. WARD, *Common but*

intentions rather than legal obligations in the strict sense, will likely persist until specific negotiations on the matter are held.

In the meantime, an analysis of the Havana Charter and the GATT *acquis* which has ripened over the past fifty years may aid in clarifying what the future holds in store for the WTO.

PART ONE

THE PROMOTION OF FULL EMPLOYMENT AND THE REGULATION OF FAIR LABOUR STANDARDS: FROM THE HAVANA CHARTER TO THE WTO

1. *The Havana Charter: an example to be followed.*

1.1. *General remarks.*

From November 21, 1947 to March 24, 1948, the United Nations Conference on Trade and Employment was held at Havana, Cuba. The Conference was concluded with the signing of a complex Agreement made up of 106 articles that, once ratified, were to give birth to a specialized agency of the United Nations called International Trade Organization (ITO). It is common knowledge that the Havana Charter ⁽¹⁶⁾, as the Agreement was called, never became effective because certain principal States, beginning with the United States, never ratified the Agreement.

Only its Part Four was completed and entered into force on January 1, 1948, by virtue of a Protocol of Provisional Application.

Differentiated Debates: Environment, Labour and the World Trade Organization, International and Comparative Law Quarterly, 1996, pp. 594-632; E. DE WET, *Labour Standards in the Globalized Economy: the Inclusion of a Social Clause in the GATT/WTO*, *Human Rights Quarterly*, 1995, pp. 443-462; S. CHARNOVITZ, *The World Trade Organization and Social Issues*, *Journal of World Trade*, n° 5, 1994, pp. 17-33; G. CAIRE, *L'Organisation Mondiale du Commerce et la clause sociale*, *Revue Internationale du Travail*, 1994, pp. 448-461.

(16) The text of the Havana Charter is found in the Final Act and Related Documents, UN Document E/Conf. 2/78, dated April 1948. UN S. No. 48.11.D.4. includes the Havana Final Act, the Havana Charter and annexes and Conference resolutions. On the content of the Charter, see: P. WILCOX, *A Charter for World Trade*, New York, 1949 and R. GARDNER, *Sterling-Dollar Diplomacy*, New York, 1969.

otherwise known as the General Agreement on Tariffs and Trade ⁽¹⁷⁾.

Fifty years later, resonance of the Havana Charter may still be heard in relation to the contemporary relevance of some of its provisions which, unfortunately, never became effective.

In particular, its Chapter II entitled "Employment and Economic Activity" ⁽¹⁸⁾ represents a complete model of reference concerning the issues to be discussed below.

1.2. *Employment regulation.*

The Havana Charter's Articles 2 to 5 are dedicated to employment and, more specifically, to its aspects connected with international trade. In Article 2, the States, aware that unemployment and under-employment could not be resolved only by national policy decisions, declare their desire for concerted efforts at the international level to design a common strategy. Furthermore, according to Article 3(2):

"Measures to sustain employment, production and demand shall be consistent with the other objectives and provisions of this Charter. Members shall seek to avoid measures which would have the effect of creating balance-of-payments difficulties for other countries".

The sensitivity of Havana Charter's negotiators towards the theme of full employment probably resulted from the traumatic experiences in the early 1930s of the great economic crisis in Western countries. According to those who inspired the negotiations, among them Keynes for Great Britain and White for the United States, joint action in national policy — such as the *Employ-*

(17) See introduction. On the negotiations, see in general: K.W. DAM, *The GATT: Law and International Economic Organization*, Chicago, 1970, pp. 225-227. For a more specific reconstruction of events, see: D. CARREAU, T. FLORY and P. JUIILLARD, *Droit international économique*, cit., pp. 95-96.

(18) On Chapter II of the Havana Charter, see in particular, P. ALSTON *International Trade as an Instrument of Positive Human Rights Policy*, *Human Rights Quarterly*, 1982, p. 171 and E. ROBERT, *Enjeux et ambiguïtés du concept de clause sociale ou les rapports entre les normes de travail et le commerce international*, cit., p. 156.

ment Act approved by the United States Congress in 1946 — coordinated and controlled at an international level, would conquer the phenomena of unemployment without creating dangerous tensions in international trade.

The other concern that is reflected in the content of the Article dedicated to full employment is the need to prevent shocks in one State (in the form of inflation or devaluation) from spilling over into other States. In fact, Article 6 provides:

“The Organization shall have regard, in the exercise of its functions under other Articles of the Charter, to the need of Members to take action within the provisions of this Charter to safeguard their economies against inflationary or deflationary pressure from abroad”.

1.3. *Fair labour standards regulation.*

The most surprising Article of the Havana Charter, both in terms of its contemporary relevance and formulation, is Article 7 entitled “Fair Labour Standards”. This Article provides:

“The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and Agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory” (19).

The passage “unfair labour conditions, particularly in production for export” is indicative of the essentially commercial concerns forming the basis of this Article. The text does not specify what “the unfair labour conditions” are, but from the preparatory works, it

(19) The text reported above is essentially that proposed by the Committee, enriched by the suggestions advanced by various delegations during their work at the Conference.

becomes clear that this refers to working conditions and wages below normal, according to a critical evaluation similar to that of the phenomenon of dumping, hence the expression social dumping (20).

The final paragraph of Article 7 is especially interesting. It contemplates:

“In all matters relating to labour standards that may be referred to the Organization in accordance with the provisions of Article 94 or 95, it shall consult and co-operate with the International Labour Organization (ILO)”.

The Charter's reference to the dispute settlement system (Articles 94-95) demonstrates the will of the negotiators to give effectiveness to the rules. Reference to the collaboration with the ILO in connection to the settlement of disputes is significant and may even be a forecast of the future.

Like the provisions on employment (Articles 2-6), Article 7 may therefore be considered as a model for reference in the drafting of specific provisions on the issue in the WTO framework.

Additionally, according to Article XXIX of the GATT, the Contracting Parties commit “to observe to the fullest extent of their executive authority the general principles of Chapters I to VI inclusive and of Chapter IX of the Havana Charter pending their acceptance of it in accordance with their constitutional procedures”. This provision was never eliminated, even after the WTO entered into force. It is thus reasonable to expect that the subject will be taken up again within the WTO framework in conformity with the principles contained in the Havana Charter (Articles 2-7).

In the meantime, we turn to current regulation, weak as it is, looking first at full employment promotion and then at fair labour standards.

(20) As A. COMBA observes, *Il neo-liberismo internazionale - Strutture giuridiche a dimensione mondiale. Dagli Accordi di Bretton Woods all'Organizzazione Mondiale del Commercio*, cit., p. 282, the term “dumping” is used incorrectly because it indicates a commercial practice exercised by a company, and not by a State, in order to conquer a market.

2. *The problems of full employment and fair labour standards in the present international trading system.*

2.1. *Employment policy and fair labour standards in a global economy: strong apprehensions.*

The positive conclusion of the Uruguay Round negotiations and the successive entry into force (the first of January 1995) of the Marrakech Agreements, signed on April 15, 1994, was hailed by all as a victory for international trade and, in general, for the expansion of the world economy. However, adequate consideration was not accorded to the effect that such liberalization would have on the national labour markets of the signatories to the Agreements ⁽²¹⁾.

Indeed, trade liberalization in certain sectors, agriculture, textiles and services in particular, strongly emphasize tendencies which have already appeared over the past few years. According to the first analyses by economists, the most important changes have occurred in the sectors of agriculture and light industries such as textiles and clothing ⁽²²⁾. Even the most rigid labour markets of industrialized countries are at risk of being hit heavily in the short run, and left unable to completely re-absorb the unemployed in the long run.

Predicted fluctuations in the labour market for the coming years reflect what has already occurred in the past, and are explained

(21) See in particular, D. GREENAWAY and C. MILNER, *Les incidents sur l'emploi du Cycle d'Uruguay*, *Revue Internationale du Travail*, 1995, pp. 548-574 and A. BRITTON, *Le plein emploi dans les pays industrialisés*, *Revue Internationale du Travail*, 1997, pp. 317-342.

(22) A reduction of employment is expected in the agricultural sector which affects between 10% and 20% in industrialized countries (except Australia and New Zealand) and a reduction of 20% in light industry in Europe and the United States. As can be predicted, there will be an expansion in industrialized countries in the services sector, although more contained in terms of percentage, around 2-5%, but practically equivalent in absolute value. For example, the increase of 1.9 % of employment in the services sector in the European Community corresponds, in absolute terms, to the predicted loss of employment in the agricultural sector. See: D. GREENAWAY and C. MILNER, *Les incidents sur l'emploi du Cycle d'Uruguay*, cit., p. 564 and E. LEE, *La mondialisation et l'emploi: des craintes justifiées?*, *Revue Internationale du Travail*, 1996, pp. 531-543; more generally, for an economic view of the problem: T. N. SRINIVASAN, *International Trade and Labour Standards from an Economic Perspective*, cit., pp. 219-243.

especially by the wide gap between industrialized and developing countries in terms of wages and labour conditions.

Take for example a production process which is particularly labour-intensive but does not require high technological skills; the European or American worker is much less competitive compared to a worker in a developing country. The latter rarely benefits from union protection, his workday is longer and his wage is up to ten times lower; he almost never goes on strike, and he enjoys no real social protection; he works under environmental and safety conditions which are hazardous, to say the least.

Indeed, the determining factor of this type of production, in terms of competitiveness, is price. Price depends largely on production costs, and especially on labour costs, which are considerably higher in industrialized countries. Thus, it is inevitable that the industrialized country, at least in the short run, will experience two closely-related phenomena: the gap in wage-levels between highly skilled workers and those who are unskilled will widen, and long-term unemployment will result among the unskilled workers.

Since the range of products susceptible to competition is continually expanding, the only suitable response to these phenomena is to further strengthen the more technologically advanced and innovative productive sectors which could bring about relief for lost employment in the highly competitive unspecialized sectors.

This said, it is uncertain if political and financial efforts by a State in favor of education and professional training are necessarily beneficial for an economy. The result of such policies in terms of increased demand for skilled workers must be weighed against the negative effects of added fiscal pressure on the workers who are already skilled in order to finance such programs. This situation, nevertheless, may be preferable to past programs which financed employment at a net loss in order to contain the phenomenon of unemployment all costs ⁽²³⁾.

(23) Many researches underline costs in different States. For example, C. HAMILTON, *A New Approach to Estimation of the Effects of non-Tariff Barriers to Trade: an Application to the Swedish Textile and Clothing Industry*, *Weltwirtschaftliches Archiv*, 1983, pp. 298-325 calculated that Sweden's efforts to

Another aspect which must be considered is the shifting of investments. Liberalization in this area (think, for example, of the Agreement on Trade — Related Investment Measures ⁽²⁴⁾) leads one to imagine that in the near future an ever-increasing number of medium — and large-sized industries will relocate their production units to places where working conditions, in terms of wages and environmental regulation, are more cost-effective ⁽²⁵⁾.

The serious employment difficulties which industrialized countries are encountering, in fact, reflect similar problems in developing countries.

Theoretically, one might expect in these countries a rise in wages of the less-skilled workers and a bridging of the wage gap. In reality, over the past few years, the opposite has occurred, especially in Latin America.

Many explanations are offered for this. First of all, there is the appearance on the international markets of increased competition (in particular from China, India and Indonesia) in traditionally labour-intensive sectors of production, which has the effect of preventing wages from rising. On the other hand, the appearance of certain moderately technological production processes, as a result of the relocation of production units from industrialized countries, greatly favors the workers who are employed in that sector, to the disadvantage of workers who pursue activities that are generally much less specialized.

It must also be kept in mind, however, that the relatively modest

protect its production in the textiles and clothing sector involve a social cost, supported by consumers, of about \$40,000 dollars for each job saved during the year, all net loss. This example is found in D. Greenaway and C. MILNER, *Les incidents sur l'emploi du Cycle d'Uruguay*, cit., p. 568.

(24) On the content of the Agreement, see: P. JULLIARD, *L'Accord sur les mesures concernant l'investissement et liées au commerce*, Société Française pour le Droit International, *La réorganisation mondiale des échanges (problèmes juridiques)*, cit., pp. 113-130.

(25) According to Nobel-prize winning economist M. MAURICE ALLAIS: "Un nombre de plus en plus grand d'activités des pays développés seraient délocalisées avec comme résultats une extension considérable du chômage et la perte totale des investissements locaux. Il n'est en réalité aucune activité industrielle qui puisse échapper à ce processus". From a 1993 speech before the French Parliament on the theme of social dumping, p. 185.

achievements in employment and wage convergence can rapidly disappear through the adoption of unwise or unsuitable monetary policies, as demonstrated by the Chilean experience in the early 1980s, and more recently by the 1994-95 financial crisis in Mexico or the current situation in South East Asia.

Confronted with such concerns, national employment policies, in industrialized and developing countries alike, are costly and inefficient in the absence of regulation, or at least coordination, at the international level.

2.2. *Current limits to employment regulation in the framework of the WTO.*

When the GATT was originally organized, the inclusion of Articles 3, 4 and 6 of Chapter II of the Havana Charter regarding employment and economic activity was proposed; this suggestion did not, however, receive the consensus of all delegations. At the 1954-55 Review Session, the proposal was made to include an article on full employment in the General Agreement. However, the Report of the Review Working Party on "Organizational and Functional Questions" notes that the Working Party considered such an insertion unnecessary since "the objectives sought through the proposed amendment were already covered in existing or proposed new articles of the Agreement (26)".

Employment is, in fact, referred to in the text of GATT Article XII which was modified on the occasion of the 1954-55 Review Session. Pursuant to the second paragraph of this Article, entitled "Restrictions to Safeguard the Balance of Payments," the Contracting Parties are authorized to impose import restrictions "(i) to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves, or (ii) in the case of a Contracting Party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves".

Thus, trade made be limited for monetary reasons linked to the

(26) From: *Analytical Index of the GATT*, Geneva, 1994, p. 341.

Balance of Payments ⁽²⁷⁾. However, according to paragraph 3(d) of the same Article:

"The Contracting Parties recognize that, as a result of domestic policies directed towards the achievement and maintenance of full and productive employment or towards the development of economic resources, a Contracting Party may experience a high level of demand for imports involving a threat to its monetary reserves of the sort referred to in paragraph 2 (a) of this Article. Accordingly, a Contracting Party otherwise complying with the provisions of this Article shall not be required to withdraw or modify restrictions on the ground that a change in those policies would render unnecessary restrictions which it is applying under this Article".

So far, no State has invoked this provision to justify quantitative restrictions on imports. However, until a detailed regulation of employment is created in the WTO framework, this kind of provision represents a safety valve as yet unused by the various Member States.

Even if the theme of employment is addressed in the preamble to the Agreement establishing the WTO, no provision, either in the statute itself or in the annexed Agreements, makes direct reference to it. The only exception is Article V bis of the General Agreement on Trade in Services, entitled "Labour Markets Integration Agreements". This Article provides:

"This Agreement shall not prevent any of its Members from being a party to an Agreement establishing full integration ^[(28)] of the labour markets between or among the parties to such an Agreement, provided that such an Agreement: (a) exempts citizens of parties to the Agreement from requirements concerning residency and work permits; (b) is notified to the Council for Trade in Services".

This provision clearly permits the integration of labour markets

(27) See: A. NADAL EGEA, *Balance of Payments: Provisions in the GATT and NAFTA*, *Journal of World Trade*, n° 4, 1996, pp. 317-328.

(28) Typically, such integration provides citizens of the parties concerned with a right of free entry to the employment markets of the parties and includes measures concerning conditions of pay, other conditions of employment and social benefits.

in the context of customs unions or free trade areas without entailing an obligation to extend the same concessions to other Contracting Parties to the General Agreement on Trade in Services.

On the whole, and as repeatedly emphasized above, the regulatory system is extremely rudimentary and must be completed as soon as possible.

2.3. *Fair labour standards and the WTO: what kind of relationship?*

Only one provision in the Agreements administered by the WTO can presently be connected to the theme of labour standards. GATT Article XX(e) provides:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Contracting Party of measures: (...) e) relating to the products of prison labour”.

During the United Nations Conference on Trade and Employment in 1947-48, some delegations attempted, unsuccessfully, to extend the reach of this exception beyond prison labour to encompass all forms of “involuntary” labour.

As it stands, States may rely on import restrictions to protect their markets, pursuant to the usual conditions, from goods manufactured with the assistance of extremely cheap labour. In light of the specific nature of the sector to which it refers, it is not surprising that this provision has never yet been invoked by any State to justify restrictions ⁽²⁹⁾.

Nevertheless, the Article is highly significant in that it authorizes States to adopt protectionist measures based on the production process of foreign goods. It is precisely this aspect that renders the provision unique in the WTO framework.

(29) Indeed, the *Analytical Index of the GATT*, cit., offers no comment regarding the use of this provision.

It is therefore no accident that this provision was cited as an example of a GATT provision which permits States to enact measures with extraterritorial effects in the well-known tuna dispute between the European Community and the United States ⁽³⁰⁾. Indeed, Article XX(e)'s exception, referring to process within the territory of another State rather than to the product itself, could well serve as a point of reference for the champions (such as the United States) of the total legitimacy of measures which envision the respect of clearly-defined production conditions, without discriminating between foreign and domestic products, regardless of where production takes place. Most notably, such measures concern harvest, fishing, and in a general manner, the environment ⁽³¹⁾.

GATT Article XX(a) authorizes States to restrict imports in connection with the need "to protect public morals". It might be possible to rely on this provision also in relation to fair labour standards.

The problem is that while measures which block access into the territory of a State, for example, of foreign-produced pornography, are adopted with the aim of protecting consumers in that State, it is argued that in the case of social dumping the aim is to protect those involved in the production of a good, with the fundamental difference that the consumers reside in the State taking action while the workers are located abroad.

Thus, in the opinions of more prudent commentators, the admission of a broad interpretation of the term "necessary" might permit States to "enforce" their own public morals even beyond their borders, thus creating a dangerous amalgamation of morality and trade, a combination whose consequences are easy to predict.

In reality, at least from a theoretical point of view, it appears undeniable that the State which adopts measures linked to public morals, whatever the domain, acts with the aim of protecting its own

(30) Report of the panel "United States - Restrictions on Imports of Tuna, II", Doc. DS29/R, unadopted report, *International Legal Materials*, 1994, p. 861.

(31) For more details on this subject, see: E. ROBERT, *Enjeux et ambiguïtés du concept de clause sociale ou les rapports entre les normes de travail et le commerce international*, cit., pp. 158-160.

consumers or workers, while indirectly or unintentionally creating consequences abroad ⁽³²⁾.

In any case, thus far, no State has invoked this exception in relation to the working conditions under which imported goods are produced.

The observations made above with reference to Article XX(a), for the most part, are also valid in relation to Article XX(b) which authorizes quantitative restrictions "necessary to protect human, animal or plant life or health".

Even if it is accepted, for example, that work affects the physical development of children, it remains unacceptable for a State to impose, even indirectly, its own labour standards on other States.

Another GATT provision, Article VI, was indicated as a potential instrument for States to protect themselves from social dumping.

This may seem inappropriate at first glance, due to the nature of the phenomenon. Indeed, while dumping, defined as the introduction of the products of one State into the market of another at a price which is less than the normal value, is practiced by private undertakings in order to conquer new markets, social dumping concerns the social policy of the entire State ⁽³³⁾.

Moreover, a product sold abroad at a price which takes into consideration its social cost should be considered as sold at a normal price, even if this price is very low. In addition, admitting the possibility of a right to compensation, entails the necessity to prove the existence of injury to producers in the importing State and the link between cause and effect of the social dumping and the damage ensued ⁽³⁴⁾.

(32) A reduction of exports means a reduction in production, loss of employment, and even the restructuring or disappearance of a specific sector in the territory of the exporting State.

(33) See A. COMBA, *Il neo-liberismo internazionale - Strutture giuridiche a dimensione mondiale. Dagli Accordi di Bretton Woods all'Organizzazione Mondiale del Commercio*, cit., p. 282.

(34) For broader discussion, see E. ROBERT, *Enjeux et ambiguïtés du concept de clause sociale ou les rapports entre les normes de travail et le commerce international*, cit., pp. 163-164.

With a view to presenting the phenomenon in its most evident forms, it seems more acceptable, at least in theory, to rely on GATT Article XVI which deals with aid.

According to this Article, States are entitled to compensation in connection with "any form of income or price support" by another State "which operates directly or indirectly to increase exports of any product".

But even in these cases, it is very difficult to demonstrate that a particular government deliberately intends to maintain a low level of labour protection so as to increase the volume of certain exports, not to mention the fact that minimum standards are yet to be established.

However, with respect to those rules presently in force, the Agreement on Subsidies and Countervailing Measures of 1994, in relation to requisite conditions for the authorization of countervailing measures, makes no reference to labour conditions ⁽³⁵⁾.

There is still another GATT provision, more procedural than substantive, which may be applicable to the issue at hand: Article XXIII (1b) and (1c). This Article contemplates:

"If any Contracting Party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of: (...) (b) the application by another Contracting Party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation",

that Contracting Party has the right to initiate consultations with the Contracting Party responsible for the breach, and if these consultations fail, to initiate dispute settlement proceedings ⁽³⁶⁾.

From a theoretical point of view, there seems to be no doubt that the protests by Contracting Parties regarding the consequences

(35) See: A. BEVIGLIA ZAMPETTI, *The Uruguay Round Agreement on Subsidies: a forward-looking Assessment*, *Journal of World Trade*, n° 5, 1995, pp. 5-29.

(36) See: A.T.L. CHUA, *Reasonable Expectations and Non-Violation Complaints in GATT/WTO Jurisprudence*, *Journal of World Trade*, n° 2, 1998, pp. 27-50.

of the practice of social dumping (in the form of particularly lax legislation in the area of labour regulation) may hinge upon Article XXIII (b) and (c) which contemplate the challenge of measures not necessarily in conflict with GATT provisions and serves as a residual category of prejudicial situations.

However, for the reasons examined in the introduction (especially the practice of *self-restraint* and the principle of the *standard of review* followed by the Dispute Settlement Body), cases in which Articles XXIII (b) or (c) have been invoked in reference to social dumping may not be raised before the GATT dispute settlement mechanism ⁽³⁷⁾. In addition, today, if the measure is held not to conflict otherwise with the WTO rules, only nonbinding recommendations are possible ⁽³⁸⁾.

After examining those GATT provisions which, at least in theory, might be invoked in relation to social dumping, the general reach of the principle of national treatment (despite its specific contemplation in GATT Article III) remains to be analyzed.

This principle, along with the general most-favored-nation clause, is the cornerstone of the WTO and provides that the contracting States are free to adopt autonomously national measures regarding conditions of sale, purchase, taxation, etc., on the condi-

(37) For a summary of cases (although few in number) where Article XXIII (b) and (c) have been invoked, see the *Analytical Index of the GATT*, cit., pp. 604-624. Note also that reference to Article XXIII in relation to labour (although it was not followed up) also occurred during the negotiation of the General Agreement. In the Tariff Agreement Committee at the Geneva session of the Preparatory Committee, in discussion of whether to include in the General Agreement the second Chapter of the Charter on 'Employment and Economic Activity', it was stated that "if a situation should arise in which considerations came up under Chapter [II of the Charter] which were not dealt with under the exceptions already provided for in Articles [XI through XV], a party could invoke" the Agreement "specifically under Article [XXIII]", *Analytical Index of the GATT*, cit., p. 621.

(38) In these circumstances, a dispute settlement panel or the Appellate Body considering the claim is limited to issuing nonbinding recommendations concerning mutual settlement, including the payment of compensation (Article 26 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*). See J.M. DILLER and D.A. LEVY, *Child Labour, Trade and Investment: Toward the Harmonization of International Law*, *American Journal of International Law*, 1997 p. 685.

tion that these measures are uniformly applied and do not discriminate against imported foreign goods.

Here, for example, the question may be raised as to the legitimacy of measures which limit or prevent access to a State's market for reasons of public order or morality, although such measures are uniformly applied to both foreign and nationally produced goods.

This question was raised in relation to environmental protection long before it was applied to labour issues.

One such example was the famous dispute between the United States and Mexico, and later between the United States and the European Community, regarding American restrictions on the import of tuna that was caught using methods which killed thousands of dolphins ⁽³⁹⁾. The panel in this case, as other panels in similar situations, determined that the principle contained in GATT Article III was applicable exclusively in reference to the *product* itself and not to its *production process*.

Following this reasoning, a State is not authorized to adopt measures, even though they apply equally to national and foreign products, which condition market access on the production process. In other words, tuna is tuna, regardless of how it is caught, just as a carpet is a carpet regardless of the age of the individual who wove it.

This view implies heavy consequences for labour conditions, child labour, union labour, etc. Legislative provisions ⁽⁴⁰⁾ which seek to prohibit certain products, such as carpets or leather balls,

(39) "United States - Restrictions on Imports of Tuna, I", Doc. DS21/R, unadopted report, *IBDD*, S39/155, p. 174; and "United States - Restrictions on Imports of Tuna, II", Doc. DS29/R, unadopted report, *International Legal Materials*, cit., p. 861.

(40) F. MAUPAIN, in his article *La protection internationale des travailleurs et la libéralisation du commerce mondial: un lien ou un frein?*, cit., p. 73, discusses the case of the proposed American law, the Harkin Bill (named after its author), which provides for the prohibition of importation and sale of any article produced using child labour. According to Senator Harkin, this law will be equally applied to American goods and is in complete conformity with Article III of the GATT. It aims simply at preventing industry in developing countries which exploit child labour from imposing their standards on the United States. Apparently there is nothing preventing this law from being cited before the WTO and from being deemed illegitimate.

which are manufactured in any location by children below a certain age would likely be found incompatible with the WTO and could not be justified even in light of Article III's national treatment clause.

A new chapter was recently opened in relation to the services sector with the General Agreement on Trade in Services ⁽⁴¹⁾, negotiated in the frame of the Uruguay Round.

Contrary to goods, which may not be conditioned by production processes that are more or less immoral, the process by which services are provided is clearly relevant ⁽⁴²⁾.

Indeed, according to the General Agreement on Trade in Services Article VI in sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. In this respect, legislation which aims at preventing services (such as accounting or data entry) from being furnished by individuals below a certain established age is difficult to challenge. It would, in fact, be more difficult to distinguish between the furnishing of a service and the means by which it is furnished, and to argue that these aspects be treated as independent from one another ⁽⁴³⁾. It is possible to imagine, here, how in the near future even legislation which has extraterritorial effect might be viewed as legitimate.

Another new tendency which is practiced more and more frequently and which so far has been allowed, is national regulation which provides, without any discriminatory intentions, for consum-

(41) Among the many contributions on this Agreement, recent work includes: P. MENGOZZI, *Le GATS: un accord sans importance pour la Communauté européenne?*, *Revue du Marché Unique Européen*, n° 2, 1997, pp. 19-44 and G. SACERDOTI, G. VENTURINI (eds), *La liberalizzazione multilaterale dei servizi e i suoi riflessi per l'Italia*, cit. On the negotiations under the Uruguay Round regarding services, see: E. GREPPI, *La disciplina giuridica internazionale della circolazione dei servizi*, Napoli, 1994, pp. 118-233.

(42) This observation is made by F. MAUPAIN, *La protection internationale des travailleurs et la libéralisation du commerce mondial: un lien ou un frein?*, cit., p. 75.

(43) It is clear enough that in the domain of services it is less frequent to encounter particularly bad working conditions or situations of child labour.

ers to be informed about the manufacturing process of goods in the same way as they are informed of contents and physical or chemical characteristics ⁽⁴⁴⁾. Obviously such information would be more efficient if it were transmitted in accordance with a multilateral convention and according to established criteria.

A similar situation which is an offshoot of the practice of labeling is the code of conduct by multinational companies working in countries or in sectors where child labour or particularly under-developed working conditions are an issue. These companies voluntarily adhere to the economic and social charter with more or less stringent commitments to improve working conditions, to raise wages and to abolish child labour ⁽⁴⁵⁾.

As for as "case laws" in this matter, until now there have been very few cases raised in the dispute settlement system.

Of these few cases, problems relating to labour conditions or their effects on the cost of a product have only been treated indirectly. This might be explained ⁽⁴⁶⁾ by the lack of specific provisions expressly regulating the matter; it might also be explained by the extreme caution exercised by panels in their interpretations ⁽⁴⁷⁾.

The first case in which the social regulation of a State was the object of a trade dispute was in 1952. In this case, Norway and Denmark challenged Belgium's regulatory system of family allocation payments on the basis of GATT Articles I (general most-

(44) In this regard, the most well-known initiative is the *Rugmark* program, launched in 1994. It was conceived after consumer groups became aware of the fact that in Southern Asia children were employed in the manufacturing of hand-woven carpets in shocking conditions. The label *Rugmark* ("Guaranteed manufactured without child labour") has since become an internationally, legally recognized mark. See: J. HILOWITZ, *Label social et lutte contre le travail des enfants: quelques réflexions*, *Revue Internationale du Travail*, 1997, p. 240 and F. MAUPAIN, *La protection internationale des travailleurs et la libéralisation du commerce mondial: un lien ou un frein?*, cit., p. 76.

(45) See: J. HILOWITZ, *Label social et lutte contre le travail des enfants: quelques réflexions*, cit., p. 237.

(46) For further precision, see: E. ROBERT, *Enjeux et ambiguïtés du concept de clause sociale ou les rapports entre les normes de travail et le commerce international*, cit., p. 164 ss. who addresses the case in question in more detail.

(47) See the introduction.

favoured-nation treatment) and III (national treatment) ⁽⁴⁸⁾. Based on its national legislation, Belgium allowed tax exemptions for products coming from States endowed with an equivalent system of family allocation payments. According to the panel, this practice not only violated Article I (in fact, Denmark and Norway had experienced discrimination compared to Sweden); but more generally, it was incompatible with the spirit of the General Agreement. The tax at issue aimed to balance costs of production and therefore had no relationship with the inherent characteristics of the product itself.

Thirty years later, labour conditions are again the object of discussion before a panel, this time in a dispute between the European Community and Hong Kong regarding restrictive measures applied to the import of radio receivers, microscopes and Chinese watches ⁽⁴⁹⁾.

As a justification for its measures, the European Community invoked general historic factors rather than the economic and social situation of each sector, claiming that GATT Article XI allows for exceptions to the general prohibition of quantitative restrictions, including measures aimed at protecting certain sectors threatened by competition from cheaply produced foreign goods.

The panel rejected the European Community's argument, finding it to be too general and lacking any solid legal foundation, noting that reliance on the general exceptions contemplated by Article XI was insufficient.

This case appears to be the only such example. However, more recently, although it involved different sectors, the WTO Appellate Body categorically reaffirmed that, at least in principle, GATT Article III on national treatment and Article XX on the general exceptions must be applied in reference to the intrinsic qualities of a product and not in reference to its production process ⁽⁵⁰⁾.

(48) "Belgium - Assistance to the Belgian Families", report adopted November 7, 1952, *IBDD*, S1/63, p. 65.

(49) "European Community - Quantitative Restrictions on the Importation of Certain Products from Hong Kong", report adopted July 12, 1983, *IBDD*, S30/135, p. 138.

(50) "Japan - Taxes on Alcoholic Beverages", report adopted October 4,

PART TWO

FUTURE PERSPECTIVES:

BOTH BROAD AND NARROW COOPERATION

3. *The Ministerial Declarations of Singapore and of Geneva.*3.1. *New elements.*

Among the important subjects that the WTO will have to confront ⁽⁵¹⁾ in the future and which, for the moment, are still within the national competencies of the Member States, full employment and fair labour standards are front and center both for their importance and for their relevance.

Following the confirmation of the December 13, 1996 Singapore Ministerial Declaration, various State delegations recently once again took up the relationship between labour conditions and international trade during the Ministerial Conference of Geneva of 18-20 May 1998.

In the Singapore Ministerial Declaration ⁽⁵²⁾, the Ministers of the States, in the special fourth paragraph, textually declared:

"We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization, contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes and agree that the comparative advantage of countries, particularly of low-wage developing countries, must in no way be put in question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration".

1996, Doc. WT/DS8/AB/R and "Canada - Certain Measures Concerning Periodicals", report adopted June 30, 1997, Doc. WT/DS31/AB/R, not yet published.

(51) See R. RUGGIERO, *Le grandi opportunità della globalizzazione, Relazioni internazionali*, 1997, pp. 16-19.

(52) Ministerial Declaration of Singapore, 13.12.1996, WT/MIN (96)/DEC/W, p. 2.

Even before analyzing the content of each of the Ministerial Declarations, it is useful to question the legal force of a declaration in the institutional scheme of the WTO.

According to Article IV of the WTO statute, the Ministerial Conference carries out the functions of the WTO and takes necessary action. In order to do so, the Conference may utilize two kinds of acts: declarations to address (in relation to its aims) and decisions to compel (on certain matters covered by the Multilateral Trade Agreements). The Declarations of Singapore and of Geneva fall into the first category.

3.2. *Content.*

Coming now to the content of the Singapore Declaration ⁽⁵³⁾, the fact that States renewed their commitment to core labour standards presupposes their previous commitment to these norms.

Recognition of the ILO as competent "to set and deal with these standards" does not deprive the WTO, at least in theory, from dealing with the same issue, for example by monitoring compliance with such standards ⁽⁵⁴⁾ as are set forth by the ILO, and settling disputes which arise in connection with their implementation.

Furthermore, in the final sentence of the paragraph, the Ministers note that "the WTO and ILO Secretariats will continue their

(53) On this subject, see: V.A. LEARY, *The WTO and Social Clause: Post-Singapore*, cit., pp. 118-122.

(54) The ambiguity of the text is due to strong opposition from various delegates present at Singapore: on the one hand, the United States and the European Community (with the significant exception of Great Britain) and on the other, the developing countries headed by Malaysia and Egypt. It was also in the context of this Conference that less harmonious interpretations were proposed. For example, the President of the Conference, M. Yeo Cheow remarked: "There is no authorization in the text for any new work on the issue. Some delegates had expressed the concern that this text may lead the WTO to acquire competence to undertake further work in the relationship between trade and core labour standards. I want to assure these delegations that this text will not permit such a development". Charlene Barshevsky, leader of the U.S. delegation replied that Mr. Yeo Cheow's remarks should be considered as totally personal and that they in no way expressed the point of view of the States present at the Conference. For more on this, see V. A. LEARY, *The WTO and Social Clause: Post-Singapore*, cit, p. 119.

existing collaboration". This collaboration will be addressed in more detail below.

To continue with the analysis of the Singapore Declaration, it ultimately seems clear that, on the one hand, trade liberalization can contribute to the "promotion of these standards", and, on the other, that the adoption and use of "labour standards" must not be for "protectionist purposes".

There is another, more interesting aspect: consensus on the fact that the comparative advantage (connected with lower production costs) enjoyed by developing countries and especially the least advanced among them, is not to be put into question. This consensus in fact, seems to be a contradiction to the commitment undertaken in the first paragraph to respect "labour standards". If these standards, as determined at an international level, are indeed respected, the comparative advantage disappears.

Moreover, while working groups were set up to tackle other sensitive issues such as competition and investment, nothing of the sort was decided at Singapore with respect to labour standards.

In any case, beyond the numerous possible interpretations, the fact remains that the Singapore Declaration serves as a guideline.

Moving to an analysis of the Geneva Declaration, adopted May 20, 1998, no explicit new references are made to the social themes raised in Singapore; nevertheless, the States declare: "We reaffirm the commitments and assessments we made at Singapore" ⁽⁵⁵⁾.

(55) A further indication of the WTO Member States' continuing interest in this theme is found in the speeches by the Heads of State or Government on the occasion of the celebration of the 50th anniversary of the entry into force of the GATT which took place in Geneva on May 19, 1998 (thus in conjunction with the Ministerial Conference). In particular, the United States President, Bill Clinton, declared: "The WTO and the International Labour Organization should commit to work together, to make certain that open trade lifts living conditions, and respects the core labour standards that are essential not only to workers' rights, but to human rights everywhere"; the President of the Commission of the European Communities, Jacques Santer, stressed: "The importance the Community attaches to the Singapore Declaration relating to core labour standards"; and, finally, the President of Brazil, Fernando Henrique Cardoso, expressing the point of view of the developing countries, specified: "With regard to the issue of a relationship between trade and labour standards, it would seem to us unjust and senseless, given the very philosophy that inspires GATT, to seek guarantees for the improvement of working

Moreover, the Geneva Declaration does indicate that the General Council may, in light of the Third Ministerial Conference, prepare an agenda concerning: (iii) (b) "recommendations concerning other possible future work on the basis of the work programme initiated at Singapore; (...) (d) recommendations arising from considerations of other matters proposed and agreed to by Members concerning their multilateral trade relations".

It is thus reasonable to expect that for the immediate future, the issue of fair labour standards will, at the very least, continue to be an argument of debate within the framework of the WTO.

Although the Ministerial Declarations of Singapore and of Geneva refer only in a rather incidental manner ⁽⁵⁶⁾ to the important theme of employment, in the preamble to the Agreement establishing the WTO, the States do recognize, among other things, that "their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment".

Here again is a declaration of intent more than legal undertakings in the strict sense. However, the significance of the fact that the reference to "ensuring full employment" is included among the objectives of the WTO is not to be overlooked.

4. *Horizontal and vertical cooperation.*

4.1. *Horizontal cooperation with the ILO.*

Recently, the discussion surrounding the possibility of international regulation of labour standards was transformed into a discussion of how and where such regulation will occur. The Declarations

conditions through punitive trade measures whose only consequence would be to aggravate the social question". Taken from <http://www.wto.org/wto/anniv/htm>.

(56) At paragraph 8 of the Declaration of Geneva, the Ministers declared: "Full and faithful implementation of the WTO Agreement and Ministerial Decisions is imperative for the credibility of the multilateral trading system and indispensable for maintaining the momentum for expanding global trade, fostering job creation and raising standards of living in all parts of the world". Ministerial Declaration of Geneva, 28.5.1998, WT/MIN(98) DEC/1.

of Singapore and of Geneva, discussed above, are emblematic of this turn of events. The discussion revolves in particular around the choice between the two possible fora: the WTO or the ILO ⁽⁵⁷⁾.

It seems almost pointless to specify that the preference granted one or the other institution depends essentially on the approach one takes to the problems of labour and the social clause; an approach which emphasizes the economic and commercial aspects of the problem clearly favors the WTO, while the approach of the protection of human rights favors the ILO.

But beyond the question of the choice of forum, the main object of discussion with reference to regulation of labour standards is the delicate issue of sanctions for eventual breaches by States. When all is said and done, the heart of the matter separating industrialized and developing countries is, in fact, the possibility to take authorized action against trade practices that the dispute settlement bodies deem to be unacceptable.

The preference of Western countries for the WTO is easily explained by the fact that the WTO's statute, in contrast to that of the ILO, provides both for a dispute settlement system as well as the possibility to take authorized countermeasures.

The ILO is an organization based essentially upon the principle of voluntarism and therefore cannot authorize one member State to take action against another State for a breach of its rules.

As previously highlighted, the Singapore Declaration represents a turning point in this discussion. According to that Declaration, and confirmed by the Geneva Declaration, the ILO is designated as the privileged (though not exclusive) forum for the regulation of labour standards; however, the need for close cooperation between the WTO and the ILO on this matter is also affirmed.

Indeed, long before the Singapore Declaration confirmed its role, the ILO had clearly demonstrated its intention to maintain its

(57) The ILO is called to confront the subject of the relation between social standards and labour. This is established in the preamble of its statute: "La non-adoption par une nation quelconque d'un régime de travail réellement humain fait obstacle aux efforts des autres nations désireuses d'améliorer le sort des travailleurs dans leurs propres pays". Constitution of the ILO, Oct. 9, 1946, 62 Stat. 3485, 15 UNTS 35.

own competence in questions of labour and the social clause by employing the means available to it and by launching a series of initiatives.

According to the ILO, the employment issue needs to be attacked on two fronts: increased international coordination of macroeconomic policies in order to sustain growth, and improved micro- and macroeconomic policies at national level in order to benefit from opportunities in both the local and global economies. The ILO is committed to providing research, analysis and advice in order to assist national policy makers and tripartite constituents to make the right choices and formulate strategies in the effort to create more jobs ⁽⁵⁸⁾.

In June 1994 ⁽⁵⁹⁾, a Committee of experts was established on purpose to discuss the issue of core labour standards in the social context of international trade liberalization, and has since that date met regularly to draft related proposals ⁽⁶⁰⁾. In addition, another Committee monitors the protection of freedom of association and collective bargaining rights, which are basic components of social dialogue and tripartite collaboration between government, employers' and workers' organizations.

Negotiations are also under way with a view to preparing a new convention for the abolition of child labour in all forms ⁽⁶¹⁾, and

(58) See, recently: *World Employment 1996/97. National Policies in a Global Context*, (ILO report), ILO, Geneva, 1996. The role of ILO was reinforced by the mandate given by the UN Summit for Social Development-Copenhagen (1995) to lead the international inter-agencies effort to promote full productive and freely chosen employment.

(59) This initiative is linked to the UN Copenhagen Summit on social development and the new economic context of the globalization of the world economy.

(60) One of the most significant contributions to date presented by the Committee of Experts is a document entitled *The Social Dimension of International Trade Liberalization* in which the possible relationships between the ILO and the WTO in the area of labour are analyzed in great detail. See document GB.261/WP/SLD/1 of October 12, 1994.

(61) For greater detail on this aspect of the problem, see: J.M. Diller and D.A. LEVY, *Child Labour, Trade and Investment: Toward the Harmonization of International Law*, cit., pp. 663-696; J. HILOWITZ, *Label social et lutte contre le travail des enfants: quelques réflexions*, cit., pp. 230-251; D.S. EHRENBURG *The*

more generally, in November 1995, a campaign was launched for the ratification ⁽⁶²⁾ of existing conventions regarding labour ⁽⁶³⁾.

Even more recently, on the occasion of the 86th International Labour Conference, held in Geneva from June 2-18, 1998, the Organization's commitment to achieving consensus on core labour standards which will be respected by the Member States, was reinforced ⁽⁶⁴⁾.

In particular, one of the major items on the agenda of the Conference was the initial discussion of a new international labour standard designed to eliminate the most extreme forms of child labour, including such practices as heavy work in mines and quarries, bonded and forced labour and other activities such as work with dangerous chemicals and machinery.

The ILO, in its current effort to redefine the issue, draws advantage from its tripartite structure which brings together the State government representatives and the representatives from workers' and employers' unions ⁽⁶⁵⁾. The definition of standards in

Labour Link. Applying the International Trading System to Enforce Violations of Forced and Child Labour, *Yale Journal of International Law*, 1995, pp. 361-417 and M.A. TONYA, *Baby Steps toward International Fair Labour Standards: Evaluating the Child Labour Deterrence Act*, *Case Western Reserve Journal of International Law*, 1992, pp. 631-666.

(62) The campaign has so far met with significant success, with the registration of 77 additional ratifications of ILO Conventions by the end of 1997.

(63) To this regard, an analysis of the status of ratification of the the conventions already in existence is surprising in many ways. For example the United States has ratified only two conventions and other Western countries just a few more. See: *Trade, Employment and Labour standards: A Study of Core Workers' Rights and International Trade*, (OECD report), OECD, Paris, 1996 and *World Development Report 1995: Workers in an Integrating World*, (World Bank report), OUP, Oxford, 1995.

(64) On this project, see: *Child Labour: Targeting the Intolerable*, International Labour Conference, 86th Session, 2-18 June 1998, Report VI, ILO, Geneva, 1998, p. 1.

(65) When the ILO was first established in 1919, in the aftermath of the First World War, its founders determined that it should be tripartite in the belief that social justice could only be achieved with the involvement of the social partners at all stages. There are numerous contributions on the ILO. For a more complete bibliography see e.g.: R. ADAM, *Attività normative e di controllo dell'OIL, e evoluzione della Comunità internazionale*, Milano, 1993.

harmony with social forces guarantees that they will be accepted by the States.

While the ILO has primary, though not exclusive, competence in questions of labour and the fundamental rights of workers, at least for the moment, the WTO does retain residual powers in these matters. More generally, it is desirable that both organizations develop adequate channels of collaboration.

One such channel might be the inclusion ⁽⁶⁶⁾ of a special provision in the framework of the WTO which obliges its Member States to respect certain ILO conventions, with countermeasures duly authorized for breaches of these conventions. Here, a violation of a given convention would be determined before the ILO, according to the procedures established in Article 26 of its statute, which guarantees impartiality, and which would, of course, include the participation of representatives of its social partners ⁽⁶⁷⁾.

The WTO would be limited to administering the stage of countermeasures according to its usual rules. This solution has the advantage of clearly defining the roles of the two organizations.

Another possibility might be the negotiation, under the auspices of the ILO, a "super convention" collecting those standards which are universally recognized in a single context so as to facilitate the successive monitoring of its proper implementation.

(66) This suggestion was made by F. MAUPAIN, *La protection internationale des travailleurs et la libéralisation du commerce mondial: un lien ou un frein?*, cit., p. 82.

(67) Any member State can lodge a complaint with the International Labour Office against another member country which, in its opinion, has not ensured in a satisfactory manner the implementation of a Convention which both of them have ratified. The Governing Body has the option to establish a Commission of Inquiry to examine the issue and present a report on the subject. The commission of inquiry formulates recommendations on measures to be taken, if necessary. The governments concerned have three months to accept these recommendations. If they do not, they may submit the case to the International Court of Justice. If a member State does not comply with the recommendations of the Commission of inquiry or with the decision of the International Court of Justice, within the stipulated time, the Governing Body may "recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith". Constitution of the ILO, Oct. 9, 1946, 62 Stat. 3485, 15 UNTS 35.

4.2. *Vertical cooperation with the European Community* ⁽⁶⁸⁾, *NAFTA and MERCOSUR.*

Regionalism is often viewed in opposition to the multilateral model ⁽⁶⁹⁾. In certain areas, such as employment policy and fair labour standards, however, some very interesting affinities and points of contact surface ⁽⁷⁰⁾.

It is quite evident that, considering the complexity of the issues touched upon, it is much easier, outside international organizations, to create a common regulatory system between States which are geographically near and culturally similar.

Thus, it might be interesting to delve briefly into how the questions of full employment and labour standards are regulated within some important regional organizations, in order to identify eventual forms of vertical cooperation between the WTO and the ILO on the one hand and some regional organizations on the other.

First, it must be remembered that Article V of the Agreement establishing the WTO contemplates, on the part of the General Council, effective forms of cooperation with other international organizations that may possess competencies in common with the WTO.

In the framework of the European Community, which is unde-

(68) The European Community and not the European Union. It is, in fact the European Community that is party to the WTO (according to Article XI of its statute); the European Union does not yet have international legal personality. On this aspect, not only with respect to terminology, see: P.L.H. VAN DEN BOSSCHE, *The EC and the Uruguay Round*, Limburg, 1995, p. 17.

(69) See: T. GEIGER and D. KENNEDY (eds.), *Regional Trade Blocs, Multilateralism and the GATT: Complementary Paths to Free Trade?*, London, 1996 and H. G. PREUSSE, *Regional Integration in the Nineties - Stimulation or Threat to the Multilateral Trading System?*, *Journal of World Trade*, n° 4, 1994, pp. 147-151 and S.A. ARANOFF, *Regional Trade Organizations, Strengthening or Weakening Global Trade?*, *American Journal of International Law. Proceedings*, 1994, pp. 309-327.

(70) On this point, among others, see: P. VAN DIJK and G. FABER, *Summary and Conclusions*, P. VAN DIJK and G. FABER (eds.), *Challenges to the New World Trade Organization*, The Hague, 1996, pp. 317-333. For a global view of the question, see: M.D. DAVIS *Multilateral and Regional Efforts to Integrate Markets: the Uruguay Round, Nafta, Asia Pacific Economic Cooperation Initiatives and the European Communities*, *American Journal of International Law. Proceedings*, 1993, pp. 340-356.

niably the most significant model of regional integration between States, even today it is only with painstaking effort that progress is achieved in the harmonization of labour standards ⁽⁷¹⁾.

Without retracing every step taken in this long process, suffice it to say that only the area of the safety and health conditions of workers has been adequately and uniformly regulated at the European Community level. Other areas ⁽⁷²⁾, such as working hours, equal opportunities for men and women, and access to the labour market are currently in the process of being regulated.

Despite the obvious difficulties of complete harmonization, there does exist on the part of the fifteen Member States a fundamental homogeneity regarding respect for minimum standards such as those which appear in the most important conven-

(71) Of course, regarding the European Community, there is an internal aspect of the problem of social dumping, and an external aspect which is much more important. Regarding the internal aspect, see for exemple: M. VELLANO, *Orario di lavoro, sicurezza sociale e competizione tra sistemi nella prospettiva comunitaria*, *Il Diritto dell'Economia*, 1997, pp. 430-439 and M.E. TIBERIO, *Considerazioni sul problema del dumping sociale nell'Unione europea*, *La Comunità internazionale*, 1995, pp. 320-327 and, more generally, M. ROCCELLA and T. TREU, *Diritto del lavoro della Comunità europea*, Padova, 1995 and F. POCAR, *Diritto comunitario del lavoro*, Padova, 1983. For the external aspect, see: P. WAER, *Social Clauses in International Trade-The Debate in the European Union*, *Journal of World Trade*, n° 4, 1996, pp. 25-42; C. BARNARD, *The External Dimension of Community Social Policy: the Ugly Duckling of External Relations*, N. EMILIOU and D. O'KEEFFE (eds.), *The European Union and World Trade Law*, Chichester, 1996, pp. 149-164 and G. FABER, *The E.C. and the WTO: Different Fields to Level*, P. VAN DIICK and G. FABER (eds.), *Challenges to the New World Trade Organization*, The Hague, 1996, pp. 95-115.

(72) On the subject of employment, the Treaty of Amsterdam of October 2, 1997, which modifies the Treaty on European Union, contains some important and interesting innovations. It provides, in the area of employment policy, the establishment of a process of coordination between all the Member States, directed by the Council of Ministers. See: J.V. LOUIS, *Le traité d'Amsterdam, une occasion perdue?*, *Revue du Marché Unique Européen*, n° 2, 1997, pp. 5-18 and R. GOSALBO BONO, *Les politiques et actions communautaires*, *Revue Trimestrielle de Droit Européen*, 1997, pp. 769-800. Voir aussi European Commission, *L'emploi en Europe*, Bruxelles, 1997 and J.L. SAURON, *Le Conseil européen extraordinaire de Luxembourg des 20 et 21 novembre 1997 pour l'emploi. Synergie des politiques communautaires et intégration des politiques nationales, ou la résurgence de la planification à la française*, *Revue du Marché Commun et de l'Union européenne*, 1997, pp. 649-655.

tions adopted in the framework of the ILO (73). Moreover, in certain legal systems, protection is even more rigorous than the European Community average. Under these circumstances, the problem of social dumping appears substantially resolved between these fifteen Member States.

In the light of these observations, superficial as they are, it seems difficult, or at least premature, to apply the European Community model of progressive harmonization at the international level for three reasons.

First of all, the relative homogeneity which characterizes the Member States of the European Community in the fundamental questions of social standards clearly does not exist among all of the States in the international community.

Next, at the international level, there is no institutional framework sufficiently evolved ultimately to legislate those rules indispensable for harmonization between different systems.

Finally, the free circulation of workers, unquestionably, is more widely accepted within the European Community than it is at the international level.

Of course, the fact that these models are incompatible at each level does not mean that certain desirable forms of cooperation cannot arise between them.

Turning to the North American Free Trade Agreement (NAFTA), this Agreement makes no specific reference to the rights of workers (74). Only its preamble, in considering the disparity in levels of development between the United States and Canada on the one hand and Mexico on the other, contemplates the social consequences of the Agreement and affirms that the liberalization of trade

(73) Each Member State ratified and implemented the major conventions negotiated under the auspices of the ILO, with certain exceptions: Luxembourg, Ireland and Great Britain did not ratify Convention n° 111 on the prohibition of discrimination; the Netherlands failed to ratify Convention n° 98 on collective bargaining; Austria, Denmark, Portugal and Great Britain have not yet ratified Convention n° 138 on minimum age for access to the labour market.

(74) More generally, on the problems of coexistence between the NAFTA and the WTO, see: F.M. ABBOTT, *Law and Policy of Regional Integration. The NAFTA and Western Hemispheric Integration in the World Trade Organization System*, Dordrecht, 1995.

between the three States has as its object the creation of new employment in the territories, the improvement of working conditions and, more generally, the elevation of the standards of living among the populations.

Pursuant to strong reservations by Canadian and American unions, a parallel Agreement was annexed to the NAFTA ⁽⁷⁵⁾.

This North American Cooperation Agreement in the field of labour aims at establishing procedures of surveillance, of cooperation and of sanctions in relation to the fundamental rights of workers, and at discouraging every initiative which opposes regulation of social issues. Both Agreements became effective on January 1, 1994.

The parallel Agreement has a clear economic orientation and does not contemplate workers' rights *per se*; its original content aims at the same time to level the competitive playing field and to preserve comparative advantages, all within the combined context of the existing legislation and of the economic frameworks of the three countries ⁽⁷⁶⁾.

The Agreement does not seek to harmonize the different laws regarding workers rights effective in the three States, nor to establish common minimum standards; rather, it seeks to guarantee the enforcement of existing laws within the three legal systems. Thus, the sovereignty of none comes into question, and Mexico, in particular, is not necessarily obliged to align its system with those of the other two countries.

As highlighted above, the originality and the weakness of the NAFTA clause is that it sets no parameters in the relations between States for the harmonization rules, such as in the European Community, for any obligation to guarantee a level of protection, as in the ILO conventions, or for the systematic identification of areas in

(75) An analogous Agreement was negotiated regarding the environment as a result of pressure from environmental groups.

(76) On this, and more generally on the social clause in the NAFTA, see: M.A. MOREAU and G. TRUDEAU, *La clause sociale dans l'Accord de libre-échange nord-américain*, *Revue Internationale de Droit Économique*, 1995, pp. 393-406, and V.A. LEARY, *Workers' Rights and International Trade: the Social Clause (GATT, ILO, NAFTA, U.S. Laws)*, cit., pp. 205-215.

which the violation of workers' rights may result in direct repercussions in the inter-state game of competition (77).

There is no space here for a detailed description of the functioning of the mechanisms of cooperation, surveillance and the sanctions provided for by the Agreement; it is enough to note that the system takes on different forms depending upon the phase in question, and in all cases, matters of the right of association, of collective bargaining, or the right to strike are beyond the reach of the system.

In case of a violation, the system foresees as an *extrema ratio* the assembly of a special arbitral group whose task is to establish whether the State that is challenged by another State or by a union in one of the three contracting States has systematically failed to effectively enforce its labour laws. In its final report, the group may recommend that the State in question take specific action, or it may impose a penalty. If the measures are not implemented or the penalty is not paid, the other two Member States may suspend tariff concessions provided for by the NAFTA up to the amount of the sanction.

The sanctions, exclusively commercial or financial in nature, confirm the purely economic dimension of the rights and labour laws contemplated by the Agreement.

More generally, with respect to the inclusion of a social clause in the context of international trade, the NAFTA, despite its limits, is a model to be considered. It represents a relevant synthesis of the attempt to bring co-existing labour rules into line with one another, and the necessity of safeguarding the comparative advantage to which the developing countries are so attached.

The MERCOSUR Agreement contains no specific provision

(77) "L'originalité et la faiblesse de la clause de l'ALENA est de ne fixer la 'barre de la loyauté' dans les relations entre Etats ni sur une harmonisation des normes, comme cela est fait dans la Communauté européenne, ni sur l'obligation d'une garantie d'un niveau de protection, comme dans les conventions de l'OIT, ni sur une recherche systématique des domaines dans lesquels la violation des normes du droit du travail a une répercussion directe sur le jeu de la concurrence inter-étatique". See M.A. MOREAU and G. TRUDEAU, *La clause sociale dans l'Accord de libre-échange nord-américain*, cit., p. 399.

concerning fundamental rights of workers. However, certain States, and Brazil in particular ⁽⁷⁸⁾, have demonstrated their intention of placing the sensitive issue (along with the issue of environmental standards) on the organization's agenda.

And finally, with respect to Asian countries, a certain reluctance to confront the question exists even on the regional level. This confirms that the strongest opposition to the establishment of international labour standards especially comes from this region of the world.

Similar views are held by African countries, as well ⁽⁷⁹⁾.

Conclusions.

As emphasized throughout this study, the debate over the possible regulation of fair labour standards and, to a certain degree, employment, sensitive issues that they are, has been transformed over the course of the past few years into a debate over the definition of how and where such regulation should occur.

In this regard, although discussions have progressed, there still remains distinct and unyielding opposition from various coalitions ⁽⁸⁰⁾, particularly concerning how the matters will be regulated. Industrialized countries oppose developing countries, representatives of the employers' unions are set against those of the workers' unions, and above all the partisans of an approach founded on economic and commercial considerations are pitted against those favoring a human rights approach.

Two other coalitions are currently forming in relation to the

(78) See especially: V. VENTURAS DIAS, *Brazil, MERCOSUR and WTO*, P. VAN DIJK and G. FABER (eds.), *Challenges to the New World Trade Organization*, The Hague, 1996, pp. 153-176.

(79) The reluctance to deal with the rights of workers, or even to confront the problem in the framework of an international organization of regional character, apparently arises from the understandable and legitimate concern with the loss of comparative advantage at an economic and commercial level, even with respect (and with even better reason) to neighboring States. See: T. ADEMOLA OYEJIDE, *The Participation of Developing Countries in the Uruguay Round: an African Perspective*, *The World Economy*, 1990, pp. 427-444.

(80) Regarding the deadlock in this confrontation, see: B.A. LANGILLE, *Eight Ways to Think about International Labour Standards*, cit., pp. 27-55.

regulatory center: those vying for the WTO, and those in favor of the ILO.

In addition, there is no actual consensus regarding which aspects of labour ought to be taken into consideration at an international level, even if the most common themes are freedom of association and collective bargaining, child labour, forced labour and non-discrimination ⁽⁸¹⁾.

The uncertainties which still persist today are equally due to the continued resistance by most States when it comes to conceding a slice of their sovereignty to international organizations, whether at a

(81) In a general manner, the definition of minimum standards is inspired in various ILO conventions. Among the more than 170 conventional recommendations, certain ones are commonly recognized as the *core conventions*: n° 87 and n° 98 on the right to organize and the right to collective bargaining, n° 29 and n° 105 on the prohibition of forced labour, n° 100 and n° 111 on the idea of non-discrimination, n° 5, n° 10, n° 59, n° 90 and n° 148 on the prohibition of child labour and, according to some, n° 155 on health and safety conditions in the workplace.

The ILO itself, in a resolution on the occasion of the International Conference on Work in 1994, recognized as *core conventions*: n°87 Freedom of Association and Protection of the Right to Organize Convention (1948) and n° 98 Right to Organize and Collective Bargaining Convention (1949); n° 29 Forced Labour Convention (1930) and n° 105 Abolition of Forced Labour Convention (1957); n° 100 Equal Remuneration Convention (1951) and n° 111 Discrimination (Employment and Occupation) Convention (1958); n° 138 Minimum Age Convention (1973). By December 31, 1997, the ILO had registered a combined total of 853 ratifications of its seven fundamental Conventions. To arrive at universal ratification of these Conventions, another 356 ratifications would still need to be registered. As of December 31, 1997, a total of 116 member States had ratified five or more of these Conventions, and 34 countries had ratified them all. In contrast, 22 countries had ratified two or fewer of the fundamental Conventions, while only five member States still had not ratified any of them (Report of the Director-General to the 86th International Labour Conference 2-18 June 1998, not yet published).

A synthesis of the fundamental and inalienable rights of workers is also presented in the text of the Universal Declaration on Human Rights, approved by the General Assembly of the United Nations on December 10, 1948, and more particularly in Articles 23 and 24; in addition, similar declarations are made by almost all regional economic organizations, for example the European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, art. 4, 213 UNTS, 221 or the American Convention on Human Rights, November 22, 1969, 1144 UNTS, 123 and the African Charter on Human and Peoples' Rights, June 27, 1981, arts. 15, 18, 21, *International Legal Materials*, 1982, pp. 58-63.

global or regional level. This resistance is manifested particularly with respect to sensitive issues such as employment and labour conditions.

This study has attempted to demonstrate how the best, most desirable solution, is compromise, especially with respect to the regulatory forum.

In fact, it seems on the one hand undeniable that the ILO is better adapted to determine core labour standards (in the framework of conventions which already exist, or of a new broad-reaching convention); on the other hand, it is also clear that the WTO disposes of instruments which are better adapted to monitor compliance and to sanction those States which stray considerably from the commitments undertaken.

Alongside the horizontal cooperation between the ILO and the WTO, it seems important a vertical collaboration between the two international organizations, on the one hand, and the regional organizations (in particular the European Community, NAFTA et MERCOSUR), on the other.

In case we do not succeed, or until we do succeed, in negotiating specific common minimum standards in the framework of the ILO, it seems important to suggest that the North American Agreement on cooperation in the area of labour (linked to the NAFTA) might be a model to follow.

Pursuant to this model, as was previously demonstrated, States simply commit to the effective enforcement of their own national labour legislation. The task of the organization is to survey that the enforcement is, indeed, effective and to intervene in clear cases of violation by means of sanctions. The solution adopted in the framework of the NAFTA might also find adequate and profitable application in the context of the WTO ⁽⁸²⁾.

(82) This is a new example of the circulation of models between regional and universal organizations and viceversa, a phenomenon which occurs more and more frequently (see note 69 above).

LUCIA SERENA ROSSI

COMMENTS

"Social clauses," along with environmental protection, represent potential limits to the liberalization of international trade ⁽¹⁾. Social limits, however, are more elusive than environmental limits because of the ambiguity clouding the question of just which interests are to be protected. This translates into a clash between wealthy and developing countries. To push too hard for social clauses may in fact lead to the "protection of the protector"; that is to say, there is a risk of protecting not the workers in the poorest countries who are subjected to lower labor standards, but rather those in industrialized countries who fear losing their jobs because of increased competition from developing countries.

Vellano's paper examines in great detail the possibility of finding a legal basis within the WTO system upon which to base the social clause. His analysis rightly begins with a reference to the Havana Charter and demonstrates how in its initial formulation, certainly more for mercantilistic than ideological reasons, the problem was perceived with more urgency than it is in present texts. Even before the liberalization process was concretely underway, unemployment was recognized as an issue of common concern. The Havana Charter had thus introduced in a far-reaching way the problem of unemployment and likewise gave consideration to the

(1) See A. GUNDERSHEIM, *A Labor Perspective in International Trade*, in *ASIL Proc.*, 1997, pp. 94-97; R. HOWSE, M.J. TREBILCOCK, *The Free trade - Fair Trade Debate: Trade, Labor, and the Environment*, in J.S. BHANDARI, A.O. SYKES, (Eds.) *Economic Dimensions in International Law: Comparative and Empirical Perspectives*, Cambridge University Press, Cambridge, 1997, pp. 186-234; G. PORRO, *Disciplina del lavoro e commercio internazionale: quali relazioni?*, in *Il Diritto dell'Economia*, 1998 n° 3.

fundamental rights of workers, referring such protection to international conventions and particularly the consultation of the ILO.

This position was quite advanced for its time and for the very low level of integration — only commercial — between the contracting states. Think, for example, of the analogous assertion which found practical application only very recently between the Member States of the European Union with the signing of the Treaty of Amsterdam and the special summit of Luxembourg of November 20-21, 1997, where agreement was reached on the provisional application of a chapter on employment contained in that Treaty. This part of the Havana Charter endures among the principles referred to in GATT Article XXIX, and so, though not part of legally complete provisions, it is one of the principles inspiring the current structure of the WTO.

Beyond these principles, however, it is very difficult to identify from the individual rules of the WTO a basis for a social clause which may limit international trade. Vellano makes an exhaustive examination of a series of GATT provisions and excludes that these provisions can be utilized to such a scope. For example, in reaction to the so-called social dumping ⁽²⁾, one may not rely on Article VI because this article deals with dumping in relation to prices; nor can Article XVI — which deals with aid be used because not even the 1994 Agreement on Subsidies refers to labor standards.

GATS Articles V bis and XIV which contemplate exceptions for reasons of public morality or public order may offer a few opportunities. Obviously, however, it is much easier to invoke such exceptions for services than for goods. Goods present the tricky problem of establishing a direct link between the product and its production process. Take child labor, for example ⁽³⁾. The distribu-

(2) Cfr. S.S. GOLUB, *Are International Labor Standards Needed to Prevent Social Dumping?*, in *Finance & Development*, 1997 n° 4, pp. 20-23, and M. LUNATI, *Liberalizzazione degli Scambi e costo del lavoro: esiste il dumping sociale?*, in G. SACERDOTI, G. VENTURINI, (Eds.) *La liberalizzazione dei servizi*, Giuffrè, Milano 1997, pp. 165-182.

(3) On this topic see J.M. DILLER, D.A. LEVY, *Child Labour, Trade and investment: toward the Harmonization of International Law*, in *AJIL* 1997, pp. 663-696.

tion of a pornographic film that exploits minors can immediately be censored. However, it is much more difficult to reach a product — a toy, for instance — which was manufactured by children, even under conditions which threaten the public order.

The problem of applying the social clause to trade in goods is twofold: first, a link must be successfully established between the product and its production process; and second, it must be clearly determined which labor conditions are unacceptable. Certainly, as Vellano emphasizes, Article XX(a) cannot be used to block trade of a good simply because in its production process employs a labor standard which is not comparable to that in more industrialized countries.

With this in mind, it becomes evident, it seems to me, that the concept of “social dumping” is an academic creation, intentionally vague, and it is indeed the clarification of this concept that constitutes the first step towards resolving the problem. Given its broad scope and ambiguity, this concept, if taken as a basis for future negotiations, risks coming up against a barrier of refusal by developing countries. In other words, to create a solid consensus capable of sparking the formation of a legal rule, it is first necessary to define what is meant by “minimum social standards” and to identify that which is to be considered so intolerable as to influence the field of trade relations and legitimize exceptions from the commitments made therein.

On this point, as Vellano observes, a loophole must be found to serve as a basis for the social clause, such as, perhaps, Article XX(b) and (e) which contemplate, respectively, restrictions necessary to protect human health and life, and goods produced by prisoners. Above all, recognition must be accorded the Singapore Declaration of December 1996 which makes mention of the fundamental rights of workers and in which the States that are committed to upholding the fundamental standards of the International Labor Organization agree to enhance collaboration between the WTO and the ILO.

The idea is attractive: a collaboration of this kind is surely very promising because the ILO could monitor labor conditions on behalf of the WTO, in a manner which is technical and exempt from suspicions of protectionist motives. Recourse to the ILO is espe-

cially important to avoid the risk that a social clause sets off a race toward unilateral trade protection.

However, in my opinion, once again, it is the notion of minimum standards that needs to be developed. It is clear that the goal of the ILO is to raise labor standards continually higher, and that this aim does not coincide with the goal of the World Trade Organization. Therefore, if a solid and effective link is to be created between the two organizations, it is necessary to establish just which labor conditions are so gravely deficient that they justify an interruption of international trade.

To this end, as Vellano suggests, the NAFTA formula might serve as a model. That is, clauses could be inserted into agreements by which each party undertakes to apply its own national rules of labor protection. In this way, each country is bound to enforce its own standards, which then become minimum standards, the violation of which is punishable through means of trade measures. Clearly, though, this solution is effective only where the contracting states are endowed, if not with analogous standards, then at least with instruments for the protection of workers rights. In addition to this limit, if such a solution were to be translated into a wider context, it would be extremely difficult to oversee the application of so many different national laws.

I believe there are also other solutions, perhaps more effective and realistic. One starting point would be to combat the most odious aspects of social dumping by relying on existing international instruments relating to the protection of fundamental rights. First, combat child labor in unacceptable conditions, and even before that, combat the sexual exploitation of children and the production of child pornography. These are crimes against which the international community is presently mobilizing and which now are on the verge of being recognized as crimes against humanity. With respect to child labor, alongside the Convention on the minimum age, already largely in force, the ILO is currently negotiating a new convention on this topic. And as for labor under conditions similar to slavery, in addition to the wording of GATT Article XX which refers to prison labor but could be interpreted broadly, it is necessary to consider Articles 1 and 56 of the United Nations Charter which prohibit

cruel, inhumane and degrading treatment, the International Covenant on Civil and Political Rights and the cogent laws against slavery (4).

Along with classical international instruments, an international certification system could be set up, where a kind of "label" would be granted, certifying for example that a product is free of child labor. This system could be supported by international organizations like the ILO, or, if dealing with a total ban on child labor, UNICEF. It could also be developed through the collaboration of private entities. Such a system would not, it seems to me, conflict with the Agreement on Technical Barriers to Trade; however, it would have to be placed beyond the reach of that Agreement which contains a clause, very favorable to developing nations, providing for an exemption from its application.

There is also the possibility to appeal to the producers of industrialized states who move production to LDCs. The most industrialized States can, either unilaterally or by drafting a convention, apply a system of incentives or sanctions to their own enterprises, imposing upon them a set of minimum labor standards.

This does not entail a prohibition of investment in "unprincipled" countries (an idea publicly criticized by President Ruggiero in a recent address to the Italian Parliament); nor does it involve the extraterritorial application of the labor laws of the richer states, a solution which would eliminate any advantage of relocation. Rather, it entails the establishment or agreement of minimum standards to be applied, at the very least, to the Multinationals. To this aim, so that ideals don't clash with the fierce game of competition, a mutually agreed solution would be preferable, i.e., a conventional instrument promoted by the G-7 or the OECD.

Finally, there is the great lever of "conditionality." This has long been experimented by the European Community with relation to fundamental human rights in the cooperation agreements with poorer countries, and could be extended to other levels of interna-

(4) See C. DI TURI, *Liberalizzazione dei flussi commerciali internazionali, norme di diritto internazionale del lavoro e promozione della dignità umana*, in *DCSI*, 1998, pp. 51-88.

tional development aid ⁽⁵⁾. In particular, the World Bank in its financing programs could impose requirements of minimum labor standards on LDCs. The European Community could insert more detailed clauses aimed at meeting such standards. These solutions are normally accepted by LDCs more easily than others since besides their cost they also carry a benefit.

The time seems right to confront the problem which, if neglected, could give birth to misunderstanding and a race towards unilateralism, but which must, above all, be stripped of its present ambiguity.

(5) On this point see P. DI FRANCO, *Il rispetto dei diritti dell'uomo e le "condizionalità" democratiche nella cooperazione comunitaria allo sviluppo*, in *Riv. dir. eur.*, 1995, pp. 543-582 and P.J. KUYPER, *Trade Sanctions, Security and Human Rights and Commercial Policy*, in M. MARESCAU, (Ed.) *The European Community's Commercial Policy After 1992: The Legal Dimension*, Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1992, pp. 401-438.

IV.

THE IMPACT ON INDIVIDUAL RIGHTS

CARLOS D. ESPÓSITO

INTERNATIONAL TRADE AND NATIONAL LEGAL ORDERS: THE PROBLEM OF DIRECT APPLICABILITY OF WTO LAW

SUMMARY: 1. Introduction. — 2. The plurality of orders. — 3. The international order and the legal character of WTO law. — A. The WTO as an international organization. — B. Norms providing for enforceable mechanisms at the national level. — C. The potential direct applicability of WTO. Agreements from the point of view of the practice of dispute settlement organs. — 4. National legal orders and the many ways of compliance with international trade law. — A. The United States of America. — A.1. The negative answer of the implementing Act of 1994. — A.2. Administrative mechanisms: Section 301 U.S. Trade Act. — A.3. The role of courts. — B. The European Community. — B.1. The negative answer of the implementing instrument's Preamble. — B.2. Administrative mechanism: the Trade Barriers Regulation. — B.3. The European Court of Justice and direct applicability: case law concerning GATT 1947 and its validity after the WTO Agreements. — 5. Conclusion.

1. *Introduction.*

The analysis of the role of private persons in international trade law can be approached from many different points of view. One essential and rather general problem of the subject is the *access* of private parties to WTO law and institutions ⁽¹⁾, a sphere where they have always been denied an active, direct role and where, at best, they have only been given the possibility of indirect access to the WTO dispute settlement system through more or less discretionary administrative national procedures. Another relevant issue is the *direct applicability* of WTO law, a field that requires the

(1) See, generally, Martin LUKAS, *The Role of Private Parties in the Enforcement of the Uruguay Round Agreements*, 29 *Journal of World Trade* 181 (1995). See also Bernard R. KILLMANN, *The Access of Individuals to International Trade Dispute Settlement*, 13 *Journal of International Arbitration* 143 (1996).

investigation of the nature of the agreements involved and the constitutional frameworks in which they are intended to be applied and enforced.

The purpose of this study is to address these issues in the context of WTO law and practice, paying special attention to its potential direct applicability. Therefore, I will ask whether the new provisions of WTO law reflect a concern that transcends states' interests and whether the practice of the WTO panels and Appellate Body takes into consideration the interests of private persons. The text is divided as follows: Part II is meant to be introductory; it presents the legal background where the relevant problems arise, what I will describe as 'the plurality of orders'. After a brief account of the WTO's character as an international organization, Part III studies the norms of Marrakech law which provide enforceable mechanisms at the Member states' level and the practice of the dispute settlement organs, focusing in the previous trends as well as the new features which may lead to the direct applicability of Marrakech law. Part IV investigates the law and practice of the European Community and the United States of America concerning direct applicability of WTO law, posing the question of whether eventual changes should be expected in the treatment of the problem by domestic courts after the entry into force of the Marrakech Agreements. I have chosen these WTO Members not only because they are two major trading partners of the Organization, but because they have established indirect administrative mechanisms especially designed to allow individuals to file complaints on foreign inconsistencies with GATT/WTO law. Finally, I draw some conclusions on the meaning of the potential direct applicability of WTO law *vis à vis* the policies for and against its adoption.

2. *The plurality of orders.*

International trade law simultaneously functions at different, though interconnected, levels. The most general and abstract level operates at the international sphere, whether bilateral or multilat-

eral. At the same time, the domestic level not only gives fundamental input to the law-creation processes that occur at the former level, but also shares a large amount of responsibility in the enforcement of the internationally agreed law. This special relationship explains why international trade law and policy has a "mixed character" of close interaction between national and international institutions. In fact, as Professor Jackson has put it, domestic and international institutions interact in such a way that "each has a strong influence on the other, and it is impossible to understand th[e] subject [of international trade law and policy] fully [...] without noticing and analyzing how these influences operate" (2).

Thus, every study of international trade law, and especially of the place of individuals within the world trade system, should have the realistic starting point of assuming a pluralistic conception (3) of legal orders. Here, such an assumption means that direct applicability may depend not only on international agreements (4), but also, and sometimes almost exclusively, on national law (5). The dual dependency of direct applicability on international and domestic law stems from the structure of international trade obligations, because international trade obligations are usually created by norms with particular objectives which do not establish the exact means by

(2) John H. JACKSON, *The World Trading System* 25 (1989). There is a second edition of this book, published in 1997.

(3) The expression is used, among others, by Gaetano MORELLI, *Nozioni di diritto internazionale*, 68 (7th ed. 1967). I use the expression to avoid the somewhat unfruitful discussion on dualism and monism at the end of the 20th century. I accept that there are good examples of both systems, particularly if one takes the transformation/implementation of law as the main distinction, but I doubt as to the relevance of the terms without qualifications, probably because I am skeptical of the administrative and judicial enforcement of monism in domestic systems. See Henry SCHERMERS, *Some Recent Cases Delaying the Direct Effect of International Treaties in Dutch Law*, 10 MICH. J. INT'L L. 266 (1989).

(4) See, generally, *The Effects of Treaties in Domestic Law* (Francis G. Jacobs and Shelley Roberts eds., 1987).

(5) On the diversity of constitutional approaches to domestic enforcement of international economic norms, see *National Constitutions and International Economic Law* (Meinhard Hilf and Ernst-Ulrich Petersmann eds. 1993); and for a general account from the point of view of public international law see Antonio CASSESE, *Modern Constitutions and International Law*, 192 *Recueil des Cours* 331 (1985 III).

which the obligees (i.e., usually the States) shall comply with those objectives. In other words, there is a commitment to obey international obligations ⁽⁶⁾, but it is up to the States to determine how they will comply with such obligations. This is an established principle of international law that has been respected by GATT 1947 Contracting Parties ⁽⁷⁾, and it continues to be a principle of the present WTO system ⁽⁸⁾. Most recently, one of the most important new organs of the Organization, the Appellate Body, has once again confirmed this general principle in the *Reformulated Gasoline* case ⁽⁹⁾, saying that its recommendation

“does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the *General Agreement* contains provisions designed to permit important state interests — including the pro-

(6) See the advisory opinion of the Permanent Court of International Justice on the *Exchange of Greek and Turkish Populations*, PCIJ, Ser. B. No. 10 (1925), at 20-21 (making reference to “a principle which is self-evident, according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken”).

(7) See *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, 37th Supp. BISD 200 (1991), Panel Report adopted on November 7, 1990.

(8) It is important to note that there has not been a rupture of the law of GATT with the creation of the WTO; on the contrary, the WTO Agreement provides in Article XVI:1 that:

“Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947”.

See Paolo MENGOLZI, *The Marrakech Agreements and its Implications on the International and European Level*, in *The Uruguay Round Results: A European Lawyers' Perspective* 115, 117-123 (Jacques H.J. Bourgeois, Frédérique Berrod and Eric Gippini Fournier eds., 1995).

(9) Appellate Body Report on *United States- Standards for Reformulated and Conventional Gasoline*, WTO Document WT/DS2/R (Jan. 29, 1996), adopted by the Dispute Settlement Body on May 19, 1996. On this case see: Jeffrey WAINCYMER, *Reformulated Gasoline under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora Out of a Chapeau?*, 18 *Michigan Journal of International Law* 141 (1996); Eric ROBERT, *L'affaire des normes américaines relatives à l'essence*, 101 *Revue Général de Droit International Public* 91 (1997).

tection of human health, as well as the conservation of exhaustible natural resources — to find expression. The provisions of Article XX were not changed as a result of the Uruguay Round of Multilateral Trade Negotiations. Indeed, in the preamble to the *WTO Agreement* and in the *Decision on Trade and Environment* ⁽¹⁰⁾, there is specific acknowledgment to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements” ⁽¹¹⁾.

The question is whether Marrakech law requires establishing methods of direct application of international trade law. The short answer to this question is in the negative. Indeed, the WTO Agreement does not provide for a ‘general’ mode of direct application of WTO law ⁽¹²⁾. As we have already seen, this is left to the autonomy of the members of the Organization. Taking this general position for granted, one may be tempted to ask if the Agreements have at least some norms which provide for mechanisms of enforcement or even if there are provisions which could be capable of being directly applied.

WTO law is fundamentally treaty law. Therefore, one should determined what kind of treaty law Marrakech law is. From the point of view of direct applicability one can distinguish among different kinds of international treaties. Let us consider two broad categories of treaties in international law: first, treaties directed exclusively to States; second, treaties directed to both States and individuals. In the first category one should include treaties that are

(10) Adopted by Ministers at the Meeting of the Trade Negotiations Committee in Marrakech on 14 April 1994. On trade and environment see, for example, Daniel ESTY, *Greening the GATT* (1994).

(11) Appellate Body Report on *United States- Standards for Reformulated and Conventional Gasoline*, at Part V: Findings and Conclusions. Cf. the Panel Report in *EC - Hormones* case.

(12) See *infra* Part III.

applicable among sovereigns only. Accordingly, States are the subjects that may comply with its provisions and may be held responsible for its breach at the international level. The Antarctic treaty ⁽¹³⁾ is an example of this kind, specially when it provides for a suspension sovereignty pretensions in the Antarctic zone. Another example of this kind is constituted by all the treaties concerning the obligations of disarmament. As for treaties directed to states and individuals, the provisions directed to individuals can take different forms — it can merely consider individuals as indirect beneficiaries of a larger system or it can grant individuals specific rights that the state must enforce in its internal legal order. Treaties enforceable in national forums provide for enforcement mechanisms directed to individuals, as happens with some human rights treaties ⁽¹⁴⁾. Of course, these categories are often mixed ⁽¹⁵⁾. One should focus not only on the apparent subjects of international treaties, but also particularly on the wording and purpose of their provisions in order to discover whether individuals appear as mere indirect beneficiaries or as eventual enforcement agents of the rights and obligations provided by the agreement. As to this category, “the issue is whether a treaty provides legal rules capable of enforcement through litigation when private parties contend their rights have been affected, or

(13) Antarctic Treaty, signed on December 1, 1959, 402 U.N.T.S. 71.

(14) I am not trying to say that all human rights norms are self-executing. However, this field of international law illustrates the relationship between international provisions and domestic orders in a unique way, mainly because of the character of human rights treaties, which seek to protect the basic rights of individual human beings. One interesting example is the Advisory Opinion of the Interamerican Court of Human Rights of 29 August 1986, recognizing an internationally enforceable right to reply or to make a correction as provided for in Article 14 of the Interamerican Convention of Human Rights. See Eduardo GIMENEZ DE ARÉCHAGA, *Self-Executing Provisions of International Law*, in *Staat und Völkerrechtsordnung, Festschrift für Karl Doehring* 409, 414-419 (1989). But see Thomas BUERGENTHAL, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 235 *Recueil des Cours* 303, 338-340 (1992-IV).

(15) I have limited the classification for the sake of the argument, nevertheless it could be extended. For example, there are treaties that relate to private rights and obligations among private persons, like the Hague Conventions on private international law. See J.H.A. van LOON, *The Hague Conventions on Private International Law*, in *The Effects of Treaties in Domestic Law* *supra* note 4, at pages 223-225.

simply provides rules applicable to sovereign relations" (16). From my point of view, this is the correct approach to understand the character of the WTO Agreements and their future evolution. But before leaving this section, it is necessary to clarify some starting points, such as the definition of direct applicability, the extent of the plurality of orders, and the place of individuals in the international trade system.

First, as to the concept of direct applicability, I am persuaded that it has multiple meanings (17). It could be a synonym of self-executing treaties, indicating that the treaty's norms do not need any domestic act to be applied by domestic courts. It could also mean that the provisions of a certain treaty are capable of being invoked by individuals at their behest. A third description connects the idea to a problem of allocation of powers. I will use the expression with these different meanings, trying, to the extent possible, to clarify which is the one under examination. The idea of direct applicability as invocability by individuals, nevertheless, is the most directly concerned here (18).

Second, I have said that any study of international trade law should begin with the assumption of the plurality of orders. This assertion is not valid without being qualified, for it has clear limits in my conception of international law. In other words, I am not proposing a "domestication of international law". Let us recall that Professor Trimble has proposed such domestication urging a reconceptualization of public international law (19). He says that

(16) Ronald A. BRAND, *Direct Effect of International Economic Law in the United States and the European Union*, 17 *Northwestern Journal of International Law & Business* 556, 559-560 (1996-1997). Also Ronald A. BRAND, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 *Stanford Journal of International Law* 479, 505-506 (1990) ("one must look at the language of those rules to determine the issue of self-execution").

(17) See Carlos Manuel VÁZQUEZ, *The Four Doctrines of Self-Executing Treaties*, 89 A.J.I.L. 695 (1995). Writing about the U.S. legal system, this author maintains that there are four doctrines of self-executing treaties instead of one: the intent-based doctrine, the justiciability doctrine, the constitutionality doctrine, and the private right of action doctrine. See also BUERGENTHAL, *supra*, note 14.

(18) For a general analysis see Martin Lukas, *supra* note 1.

(19) Philip TRIMBLE, *International Law, World Order, and Critical Legal*

"Public international law should be reconceptualized. Instead of being seen as a single, unitary system applicable across the "world community", public international law should be imagined as a series of parallel systems, more or less convergent depending on the subject, separately applicable within the various nations of the world. Under this approach public international law resembles private international law, where each state has its own set of choice of law rules (or other independently adopted rules) applicable to "private" controversies, but where those rules are similar in content and in fact provide a large measure of uniformity and predictability throughout the world".

The idea of a plurality of orders falls short of that proposed reconceptualization. It is intended to clarify international law's relationship to domestic legal orders ⁽²⁰⁾, and not to diminish or negate the autonomy of the concept of international law.

Third, as regards to the place of individuals in international trade law, as already noted, I would like to make clear that they have a secondary role at the institutional and legal international level; once directly applicable norms have been established by States, however the legitimate expectations of the private parties should be taken seriously by their domestic legal orders ⁽²¹⁾. As Meinhard Hilf has recently put it: "The basic protection of fundamental rights

Studies, 42 *Stanford Law Review* 811, 835 (1990). See the response of professor D'AMATO in *International Law Anthology* 403 (Anthony D'Amato ed., 1994), and the reply of professor Trimble at page 408.

(20) More concretely, in the case of international trade law, professors Jackson and Sykes have shown that there are three stages in which domestic legal systems affect the WTO system: negotiation, ratification and implementation. John H. JACKSON and Alan SYKES, *Introduction and Overview*, in *Implementing the Uruguay Round* (John H. Jackson and Alan Sykes eds. 1996), at page 5.

(21) I am aware that the terminology of rights could create some confusion in this context. Indeed, since international trade law is primarily directed to States and does not establish individual rights automatically, to talk about individual rights has meaning only if a domestic system has given those international provisions a domestic translation. This is what is meant by the words of Hilf quoted above (see *infra* note 22). I want also to leave no doubts as to my rejection of the actual existence of a general "human right to export" defended by some scholars. See ERNST ULRICH PETERSMANN, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991).

within international trade relations is only applicable within a given trade policy. The individual certainly has no right to demand a specific trade policy with regard to foreign markets. However, as soon as the competent authorities establish a specific policy or market-organization, the individual has a right to be treated at least in accordance with the basic rule of non-discrimination" (22).

In this study I will argue that the WTO system does not aim at protecting State's interests only, but serves a general public interest in which individuals are seen at least as beneficiaries of the international trade system established by the WTO law. Professor Meinhard Hilf has advanced this idea in the same article quoted in the previous paragraph, suggesting that "[p]erhaps like the European Community, the WTO should be understood as a system serving in the last resort not only its Members, but mainly the individual operators in the markets, who by their use of economic freedoms bring the abstract rules into real application" (23). A recent article written by Ronald Brand has made a similar point, arguing that "[o]ne of the most important and challenging issues in international law is the manner in which we address the relationship between the individual and the international legal system" and that "the concept of direct effect of international economic law carries great significance in the development of th[is] relationship [...]" (24).

These theses are not identical, but are closely related to the idea strongly defended by Petersmann (25), which I shall call the thesis of *the improvement of the enforcement of international trade law*: the enforcement of WTO law would be greatly improved if individuals were able to bring cases before domestic courts relying on its provisions. Even those scholars which are tolerant with the thesis of

(22) Mainhard HILF, *The Role of National Courts in International Trade Relations*, 18 *Mich. J. Int'l. L.* 321, 325 (1997).

(23) *Id.*, at page 356.

(24) Ronald A. BRAND, *Direct Effect of International Economic Law in the United States and the European Union*, *supra* note 16, at page 608.

(25) See, for example, Ernst-Ulrich PETERSMANN, *The GATT/WTO Dispute Settlement System* (1997). At page 8 of this recent book he says: "Political theory, and historical experience (e.g. in the context of EC law and the European Convention of Human Rights), confirm that granting actionable rights to self-interested citizens offers the most effective incentives for a self-enforcing liberal constitution".

the negative enforcement of WTO law in national legal systems seem to accept the doctrinal soundness of this idea ⁽²⁶⁾.

3. *The international order and the legal character of WTO law.*

A. *The WTO as an international organization.*

The WTO ⁽²⁷⁾ is an international organization established in 1994 as a consequence of the end of the Uruguay Round negotiations ⁽²⁸⁾. The WTO as an institution, and also as a treaty, represents the end of a successful, long-standing "provisional" legal situation that was started back in 1947 with the Habana Charter and the General Agreement of Tariffs and Trade (GATT) ⁽²⁹⁾. The Habana Charter and the proposed International Trade Organization never came into force as a matter of strict law, but the GATT prevailed as the principal international agreement regulating trade among national states. Nevertheless, the General Agreement did not enter into force; it was applied and enforced only on a provisional basis ⁽³⁰⁾.

(26) Piet J. KUIJPER, *The New WTO Dispute Settlement System: The Impact on the Community*, in *The Uruguay Round Results: A European Lawyers' Perspective*, *supra* note 8, at page 87. See also Piet J. KUIJPER, *The Conclusion and Implementation of the Uruguay Round Results by the European Community*, 6 E.J.I.L. 222 (1995); and Philip Lee and Brian KENNEDY, *The Potential Direct Effect of GATT 1994 in European Community Law*, 30 JOURNAL OF WORLD TRADE 67 (1-1996) ("Enforcement would be greatly improved if individuals were able to bring cases before domestic courts relying on its provisions").

(27) Agreement Establishing the World Trade Organization, done at Marrakech, April 15, 1994 (in force since January 1, 1995). For the whole process see, for example, Paul DEMARET, *The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization*, 34 *Columbia Journal of Transnational Law* 125 (1995).

(28) For a history of the negotiations see *The GATT Uruguay Round: A Negotiating History* (1986-1992), (Terence P. Stewart ed., 1993). See also Jeffrey J. SCHOTT, *The Uruguay Round: An Assessment* (1994). A general description of its outcomes can be found in David W. LEEBRON, *An Overview of the Uruguay Round Result*, 34 *Columbia Journal of Transnational Law* 11 (1996).

(29) The origins and early history of the GATT have been told in many qualified treatises: in general see John H. JACKSON, *World Trade and the Law of GATT* (1969).

(30) Protocol of Provisional Application, IV GATT, BISD 76-77 (1969). See M. N. HANSEN and E. VERMULST, *The GATT Protocol of Provisional Application: A*

The WTO Agreement, now in force since January 1995, is an example of excellent codification ⁽³¹⁾, combined with reasonable and necessary innovations. The major breakthrough of the Marrakech Agreement is, of course, the very creation of a new institutional framework for the governance of international trade and related issues ⁽³²⁾. This new formal international organization is composed of a Ministerial Conference, which replaces the Contracting Parties and is open to all members of the WTO, the General Council, the Dispute Settlement Body, and several other specialized Councils. There is also a Secretariat headed by a Director General. These institutions shall administer, implement, and supervise all WTO agreements. In addition, they shall be the hosts of future negotiations and agreements.

As to the topic of dispute settlement ⁽³³⁾, the new system has received a most interesting *aggiornamento*, though respecting the core of the norms that guided the GATT 1947 system. Two documents are essential to the present characterization of the dispute settlement system: the Marrakech Agreement and the Understanding on Rules and Procedures Governing the Settlement of Disputes ⁽³⁴⁾ (DSU), which is an integral part of the WTO Agreement. These documents contain the institutional and normative provisions that make the WTO dispute settlement system significantly different in comparison with the old GATT 1947 system. From an institutional point of view, the system is now well founded within an international organization entitled with legal personality. In addition, a new organ called the Dispute Settlement Body, which is in fact an *alter ego* of the Council, has been created. The DSB has its

Dying Grandfather?, 27 COLUM. J. TRANS'L L. 263 (1988/89). Today, after the WTO Agreements, this Protocol has only a historical relevance.

(31) On codification see Shabtai ROSENNE, *Codification of International Law*, in I *Encyclopedia of Public International Law* 632 (Rudolf Bernhardt ed. 1992).

(32) Article I of the WTO Agreement.

(33) See, generally, PETERSMANN, *supra* note 25; *International Trade law and the GATT/WTO Dispute Settlement System* (Ernst-Ulrich Petersmann ed. 1997); Aldo LIGUSTRO, *Le controversie tra stati nel diritto del commercio internazionale: dal GATT all'OMC* (1996); Miquel MONTAÑA MORA, *La Organización Mundial del Comercio y el reforzamiento del sistema GATT* (1997).

(34) Annex 2.

own rules and presidency, and its functions are, among others, to establish panels at the request of a complaining party and to adopt panel reports. Both the establishing of a panel and the adoption of panel and Appellate Body reports are decisions to be taken automatically, unless the DSB decides by consensus not to adopt the report ⁽³⁵⁾. This procedure, so-called "negative consensus", is one of the most relevant provisions of the DSU, going even further than the proposed "consensus minus two" formula, which was rejected in the Midterm Agreement on dispute settlement ⁽³⁶⁾.

The already mentioned institutional developments of international trade law may be accompanied by a reconsideration of the nature of WTO law and its meaning within the system ⁽³⁷⁾. The character of GATT/WTO law has always been extremely difficult to define from a general point of view ⁽³⁸⁾. In fact, as occurs with most norms, the GATT/WTO rules embody different characteristics and legal values and, in particular the ones we are now concerned with, have plenty of gray attributes -some of them constitute vague obligations, a few are said to be potentially self-executing ⁽³⁹⁾ norms, others reflect imprecise legal principles and many of them display a sort of soft law character. For all these reasons, substantive GATT/WTO law has been characterized as a code ⁽⁴⁰⁾ rather than a precise regulatory system.

The system as a whole promotes negotiation ⁽⁴¹⁾, because it is

(35) See Articles 16 DSU.

(36) See Robert E. HUDEC, *Enforcing International Trade Law* 231 (1993).

(37) G. Richard SHELL, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L. J. 829 (1994/95).

(38) For example, see Pär HALLSTRÖM, *The GATT Panels and the Formation of International Trade Law* 102-113 (1994).

(39) John H. JACKSON, *supra* note 29, at page 12. Professor Jackson says in this page that "One of the reasons that makes GATT an interesting object of scrutiny (...) is that it was intended to contain precisely formulated legal rules, sometimes termed "contractual," which were to be directly applied without further elaboration". But see John H. JACKSON, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 A.J.I.L. 310 (1992).

(40) See Asif H. QURESHI, *The WTO: Implementing International Trade Norms* (1996), specially chapter 2 called "The WTO Code". See also Oliver LONG, *Law and Its Limitations in the GATT Multilateral Trade System* (1985).

(41) See Article 3.7 DSU: "A solution mutually acceptable to the parties to

“based on the principle of negotiations undertaken on the basis of reciprocal and mutually advantageous arrangements,” and therefore, GATT/WTO norms usually permit a great range of bargaining ⁽⁴²⁾. Nevertheless, one should not misunderstand this fact, for it does not mean that activities that are deemed GATT-illegal can always be negotiate away; the susceptibility of negotiation must respect the mandatory principle that among the many possible outcomes, only those solutions consistent with the GATT/WTO norms are allowed ⁽⁴³⁾. This has to be read together with the new characteristics of the WTO dispute settlement mechanism, in which the operation of the rule of negative consensus will lead almost automatically to the adoption of panel and Appellate Body reports which are commonly considered as being internationally binding obligations ⁽⁴⁴⁾ when adopted.

The WTO as an international organization is the product of a compromise between ideals and realistic goals. It is an idealistic compromise because it aims at stopping economic wars and limiting unilateralism. Notwithstanding these aims, it has the realistic objective of ensuring predictability, security and confidence in international trade law. These aims to a large extent represent a package deal which tries to reconcile the very important objective of achiev-

a dispute and consistent with the covered agreements is clearly to be preferred”. On this subject, see the contribution of Elisa Baroncini to this book.

(42) This is true of the norms and the GATT 1947 system, as is well shown by the problem of the role of *de facto* agreements. See Frieder ROESSLER, *Law, De Facto Agreements and Declarations of Principles in Economic Relations*, 21 *German Yearbook of International Law* 27 (1978).

(43) Ernst-Ulrich PETERSMANN, *The GATT Dispute Settlement System as an Instrument of the Foreign Trade Policy of the EC*, in *European Community External Trade Law After the Uruguay Round* 253 (N. Emiliou y D. O’Keefe eds., 1996) (critiquing the European Court of Justice’s Bananas Judgment of 5 October 1994 against Germany’s application for the annulment of Title IV of the EC’s Council Regulation 404/93 on the common organization of the market of bananas (case C-280/93, *Germany v Council* [1994] ECR I-4973)).

(44) John H. JACKSON, *The WTO Dispute Settlement Understanding - Misunderstanding on the Nature of Legal Obligation*, 91 *AJIL* 60 (1997). For a different view, see Judith HIPLER BELLO, *The WTO Dispute Settlement Understanding: Less is More*, 90 *AJIL* 416 (1996).

ing speedy solutions to international trade disputes and constituting an alternative to unilateralism.

With these objectives in mind, one should recall that the system does not necessarily aim at being open in a general sense. It is true, however, that the WTO has dramatically improved some "democratic" features of the system. One very interesting example is the role of transparency in the new system. This is reflected not only in the norms of the Marrakech law ⁽⁴⁵⁾, as the duty to notify mutually agreed solutions evidences, but also in the practice of the dispute settlement organs ⁽⁴⁶⁾. Nevertheless, the WTO Agreement does not provide for judicial review over the validity of law making acts by their organs ⁽⁴⁷⁾. Moreover, regarding the place of individuals in the system, as already noted, it does not provide for a general access to WTO institutions to defend legal rights or to challenge the legality of institutional law making acts.

International law has relatively recently admitted individuals as subjects of its provisions. This change stemmed from an ideological conviction to protect human rights after the second World War ⁽⁴⁸⁾. In the context of the World Trade Organization, however, a preliminary question should be addressed: why should this public international organization allow private parties access to its institutional bodies? One possible answer is provided by the thesis of the improvement of the enforcement of international trade law and the consequent limitation of governments' discretionary powers ⁽⁴⁹⁾. Another answer could be based on the improvement of the protection of the very rights of individuals and the strengthening of the

(45) See Demaret, *supra* note 27, at page 135.

(46) *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, AB-1996-3, Section IV. Transparency is present also in the general institutional practice of the WTO, as is evident from the publication in the Internet of all the reports, news and documents, without any delay. It is true, however, that the mutually agreed solutions are not usually published, the case of *Japan-Taxes on Alcoholic Beverages* being the only exception to this rule. For an overview see <http://www.wto.org/two/dispute/distab.htm>.

(47) Ernst-Ulrich PETERSMANN, *supra* note 25, at 62.

(48) Antonio CASSESE, *International Law in a Divided World* 75, 99-103 (1986).

(49) See PETERSMANN, *supra* note 21.

principle of the rule of law ⁽⁵⁰⁾. What needs to be stressed is that the new dispositions reflect a concern that transcends the interests of States. The above mentioned duty of notification of mutually agreed solutions and the idea of public interest in the decisions of WTO Institutions and Member States are clear indications of this fact.

In the next two sections I will consider, first, some examples of enforcement mechanisms of rights by individuals provided in WTO norms and, second, the practice of the Panels and Appellate Body in order to see how these organs take into consideration the interests of private parties.

B. *Norms providing for enforceable mechanisms at the national level.*

The WTO Agreements provide several examples of norms directed toward private parties. Perhaps the most interesting case is the TRIPS agreement, but it is not the only one. Other related examples are Article X:3 of GATT 1994, Article 13 of the Anti-Dumping Agreement, Article 23 of the Subsidies Agreement, and Article 4 of the Agreement of Preshipment Inspection. The following is not intended as a thorough analysis of these norms, but as a simple overview in order to support the hypothesis that the WTO Agreements have a place for private parties in their general structure.

Article X of GATT 1994 is entitled "Publication and Administration of Trade Regulations" ⁽⁵¹⁾ and constitutes an expression of the already mentioned principle of transparency ⁽⁵²⁾. In its third paragraph, the norm provides for a uniform, impartial, and reasonable administration of all the "laws, regulations, judicial decisions

(50) Lukas has made this point: "The rule of law in international trade will be supported if as many economic actors as possible have the right to access the enforcement mechanism". See Martin LUKAS, *supra* note 1, at p. 199.

(51) See GATT, *Analytical index: Guide to GATT Law and Practice* 293-312 (Updated 6th Edition, 1996).

(52) Cf. Article 3.6 of the Dispute Settlement Understanding, providing for the notification of mutually agreed solutions to the DSB and the relevant Councils and Committees.

and administrative rulings of general application" covered by the Article. Remarkably, this Article states in the subsection (b) of the same paragraph that:

"Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts".

Article 13 of the Anti-Dumping Agreement provides that

"Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities for the determination or review in question".

Article 23 of the Subsidies Agreement, entitled "Judicial Review", provides as follows:

"Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determinations or review in question, and shall provide all interested parties who participated in the administrative proceedings and are directly and individually affected by the administrative actions with access to review".

Article 4 of the Agreement of Preshipment Inspection ⁽⁵³⁾ is called "Independent Review Procedures", and aims at solving the trade distortions that stemmed from the fact that "most governments that employ preshipment inspection firms have no established appeals process to which exporters can apply" ⁽⁵⁴⁾. In harmony with the whole WTO system, this Article calls for the encouragement of mutually agreed solutions between preshipment inspection entities and exporters. Nevertheless, it also provides that "either party may refer the dispute to independent review". Accordingly,

"Members shall take such reasonable measures as may be available to them to ensure that the following procedures are established and maintained to this end:

(a) these procedures shall be administered by an independent entity constituted jointly by an organization representing preshipment inspection entities and an organization representing exporters for the purposes of this Agreement;

(b) the independent entity referred to in subparagraph (a) shall establish a list of experts as follows:

(i) a section of members nominated by an organization representing preshipment inspection entities;

(ii) a section of members nominated by an organization representing exporters;

(iii) a section of independent trade experts, nominated by the independent entity referred to in subparagraph (a).

The geographical distribution of the experts on the list shall be

(53) Margaret E. EDOZIEN, *Non-Tariff Measures*, in *The GATT Uruguay Round: A Negotiating History* (1986-1992), supra note 28, at pages 699-801; Hamisi S. KIBOLA, *Pre-shipment Inspection and the GATT*, 23 *Journal of World Trade* 48 (2-1989); W. von RAAB, *Pre-shipment Inspections: Improved Administration of an International Trade Regime*, 25 *Journal of World Trade* 87 (5-1991). As regards the documents, see Agreement on Preshipment Inspection, in Uruguay Round of Multilateral Negotiations: legal Instruments embodying the Results of Multilateral Trade Negotiations done at Marrakech on 15 April 1994, vol. 27, pp. 22313-22232. For the EC, see Council Regulation (EC) No. 3287/94 of 22 December 1994 on pre-shipment inspections for exports from the Community, in P. RAWORTH, *Foreign Trade Law of the European Union* 464 (1995). See also WTO, *Preshipment Inspection Body becomes operational*, Geneva, 1996 (Press/47) (<http://www.wto.org/wto/Pressrel/press47.html>).

(54) Edozien, supra note 53, at page 741.

such as to enable any disputes raised under these procedures to be dealt with expeditiously. This list shall be drawn up within two months of the entry into force of the WTO Agreement and shall be updated annually. The list shall be publicly available. It shall be notified to the Secretariat and circulated to all Members;

(c) an exporter or preshipment inspection entity wishing to raise a dispute shall contact the independent entity referred to in subparagraph (a) and request the formation of a panel. The independent entity shall be responsible for establishing a panel. This panel shall consist of three members. The members of the panel shall be chosen from section (i) of the above list by the preshipment inspection entity. The second member shall be chosen from section (ii) of the above list by the exporter concerned, provided that this member is not affiliated to that exporter. The third member shall be chosen from section (iii) of the above list by the independent entity referred to in subparagraph (a). No objections shall be made to any independent trade expert drawn from section (iii) of the above list;

(d) the independent trade expert drawn from section (iii) of the above list shall serve as the chairman of the panel. The independent trade expert shall take the necessary decisions to ensure an expeditious settlement of the dispute by the panel, for instance, whether the facts of the case require the panelists to meet and, if so, where such a meeting shall take place, taking into account the site of the inspection in question;

(e) if the parties to the dispute so agree, one independent trade expert could be selected from section (ii) of the above list by the independent entity referred to in subparagraph (a) to review the disputed in question. This expert shall take the necessary decisions to ensure an expeditious settlement of the dispute, for instance taking into account the site of the inspection in question;

(f) the object of the review shall be to establish whether, in the course of the inspection in dispute, the parties to the dispute have complied with the provisions of this Agreement. The procedures shall be expeditious and provide the opportunity for both parties to present their views in person or in writing;

(g) decisions by a three-member panel shall be taken by majority vote. The decision on the dispute shall be rendered within eight

working days of the request for independent review and be communicated to the parties to the dispute. This time-limit could be extended upon agreement by the parties to the dispute. The panel or independent trade expert shall apportion the costs, based on the merits of the case;

(h) the decision of the panel shall be binding upon the preshipment inspection entity and the exporter which are parties to the dispute”.

Finally, the TRIPS Agreement is an outstanding example of the role that private parties are able to play in international trade law. This fact is already recognized in the TRIPS preamble when it says that “intellectual property rights are private rights.” The TRIPS Agreement reflects a common concern in the negotiations about the degree of protection that private parties may have at domestic levels ⁽⁵⁵⁾. Accordingly, the TRIPS Agreement provides for general obligations to establish effective methods of civil, administrative, and criminal protection of intellectual property rights ⁽⁵⁶⁾. An extensive analysis of all these provisions is beyond the scope of this study; I would like to emphasize, however, Members’ general obligations as provided in Article 41 of the Agreement. This Article reads as follows:

“1. Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnec-

(55) See, for example, *Shu Zhang, De l'OMPI au GATT* 344 (1994).

(56) See Part III of the TRIPS: “Enforcement of intellectual property rights” (Articles 41-61).

essarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least their legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.

5. It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general".

The above mentioned norms demonstrate that the Uruguay Round negotiators had in mind enforcement mechanisms that go well beyond the framework of classic interstate rights and obligations. Private parties are protagonists in all these mechanisms, which are established by WTO Members to endow private parties a fair degree of protection by independent organs at domestic levels.

C. *The potential direct applicability of WTO. Agreements from the point of view of the practice of dispute settlement organs.*

In the previous section I have singled out some normative provisions which are concerned with the enforcement of WTO rights and obligations by individuals in a rather direct manner. Now I would like to turn to the practice of the dispute settlement organs,

particularly the Appellate Body, to examine their posture towards private parties within the world trade system.

As previously noted, a new institutional context permits the operation of the dispute settlement mechanism within "an integrated system" (57). This WTO Dispute Settlement Understanding may have many conciliatory features (58), but it is essentially new not only because of its institutional background, but mainly because it incorporates the rule of negative consensus and creates a standing Appellate Body. We will see that the following excerpts of the reports of the Appellate Body could be seen as *obiter dicta*. However, one should be aware that the Appellate Body with its first reports is definitely contributing to build an institution. Therefore, its statements could also be understood as *manifestos* (59) for the WTO (60).

It is important to start by remarking that international trade disputes, although not directly lead by individuals at the international institutional levels, are usually derived or even initiated by a domestic enterprise (61). The latter case will be illustrated with the operation of administrative mechanism of enforcement in the next Part IV. The former case, i.e., that of derivation of a dispute, could be illustrated by the *Brazil - Measures Affecting Desiccated Coconut* (62) case, which concerned

"a decision to impose a definitive countervailing duty as the culminating act of a domestic legal process which starts with the filing of an application by the domestic industry, includes the initiation and conduct of an investigation by an investigating authority, and normally leads to a preliminary determination and a

(57) AB-1996-4, at IV.B.

(58) A remarkable example is the idea of "achieving a satisfactory settlement of the matter", securing "a positive solution to a dispute" and favoring "mutually agreed solutions" during all the stages of a dispute. See, especially, Article 3.7 DSU.

(59) I owe this idea to Professor Paolo Mengozzi.

(60) Besides, one never knows when an *obiter dictum* may be raised to a pedestal of a system of law. The paragraph on the obligations of *ius cogens* in the *Barcelona Traction* case comes to mind as one of this cases. See *Barcelona Traction Light and Power Company*, ICJ Reports 1970, p. 31.

(61) PETERSMANN, *supra* note 21, at page xxvii.

(62) AB-1996-4, at IV.A.

final determination. A positive final determination that subsidized imports are causing injury to a domestic industry authorizes the domestic authorities to impose a definitive countervailing duty on subsidized imports."

An analysis of Panel and Appellate Body reports reveals that these organs are aware of how WTO law could affect individuals. I will provide examples from the "jurisprudence" of the Appellate Body.

In the *Japan - Taxes on Alcoholic Beverages* case, the Appellate Body reaffirms the sovereignty of the WTO Members ⁽⁶³⁾. When interpreting Article III of GATT, it also said that its interpretation of that Article "is faithful to the "customary rules of interpretation of public international law". However, it also affirmed the strong character of WTO norms in the following manner:

"WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the 'security and predictability' sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system" ⁽⁶⁴⁾.

This could be understood as a interstate-like statement. Nevertheless, it is also true that the ideals of security and predictability will benefit individuals in a substantial manner. An example of this is the principle of transparency of the system. The Appellate Body said in this regard that

(63) Report of the Appellate Body of 4 October 1996 on *Japan - Taxes on Alcoholic Beverages*, AB-1996-2. At Section F: Interpretation of Article III, it says: "The *WTO Agreement* is a treaty — the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the *WTO Agreement*."

(64) *Japan - Taxes on Alcoholic Beverages*, Report of the Appellate Body of 4 October 1996, AB-1996-2, Section H: Article III.2.

“Article X:2, *General Agreement*, may be seen to embody a principle of fundamental importance—that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions. The essential implication is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures. We believe that the Panel here gave to Article X:2, *General Agreement*, an interpretation that is appropriately protective of the basic principle there projected” (65).

Another express reference to private parties is made in the same *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear* case (66), where the Appellate Body said:

“It is essential to note that, under the express terms of Article 6.10, *ATC*, the restraint measure may be “applied” only “after the expiry of the period of 60 days” for consultations, without success, and only within the “window” of 30 days immediately following the 60-day period. Accordingly, we believe that, in the absence of an express authorization in Article 6.10, *ATC*, to backdate the effectivity of a safeguard restraint measure, a presumption arises from the very text of Article 6.10 that such a measure may be applied only prospectively. This presumption appears to us entirely appropriate in respect of measures which are limitative or deprivational in character or tenor and impact upon Member countries and their rights or privileges and upon private parties and their acts”.

In the *Coconuts* case (67) the Appellate Body went further in the

(65) *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, Report of the Appellate Body, AB-1996-3, Section IV.

(66) *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, Report of the Appellate Body, AB-1996-3, Section IV.

(67) *Brazil - Measures Affecting Desiccated Coconut*, Report of the Appellate Body, AB-1996-4, of 21 February 1997, Part E.3.

use of such language, remarking on the fairness ⁽⁶⁸⁾ of the system *vis à vis* individuals. It said:

"Because a countervailing duty is imposed only as a result of a sequence of acts, a line had to be drawn, and drawn sharply, to avoid uncertainty, unpredictability and unfairness concerning the rights of states and private parties under the domestic laws in force when the *WTO Agreement* came into effect."

Notwithstanding these general statements and all the changes of the system, and even taking the position that the DSU represents a quasi-judicial system ⁽⁶⁹⁾ which downplays the prevalence of some specifically diplomatic elements that have made their way to new system, it should be clear that "the presence or absence of a dispute settlement system in the agreement does not control the direct effects analysis" ⁽⁷⁰⁾. However, this does not mean that there is no room for interaction. For example, professor Lowenfeld has written that "the value of a dispute settlement system process is not only to resolve current controversies between states: equally, or perhaps even more important, it should serve ammunition in the debates that go on within each member state (and of course within the EC or Union) when a given measure is proposed and objected to on the ground that it is 'GATT-illegal'" ⁽⁷¹⁾.

4. *National legal orders and the many ways of compliance with international trade law.*

As noted, national legal orders affect international trade obliga-

(68) Cf. Thomas FRANCK, *Fairness in International Law and Institutions* (1995).

(69) See, e.g., Miguel MONTAÑA MORA, *A GATT with Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 *Columbia Journal of Transnational Law* 103 (1993). See also Gerald R. SHELL, *supra* note 37.

(70) Ronald A. BRAND, *Direct Effect of International Economic Law in the United States and the European Union*, *supra* note 16, at 602. This position is not new at all; see, for example, Gunther BEBR, *Agreements Concluded by the Community and their Possible Direct Effect: From International Fruit Company to Kupferber*, 20 *C.M.L.Rev.* 35, 61 (1983).

(71) Pierre PESCATORE, William J. DAVEY, ANDREAS F. LOWENFELD, *Handbook of WTO GATT Dispute Settlement* (1996), Preface, at p. xi.

tions at different stages: especially in negotiating, ratifying and enforcing international commitments. In the following pages I choose two examples of this interaction to see, very briefly, how the problem of direct applicability of WTO has been dealt with. The election of the cases is justified by the fact that both concern major trade partners of the WTO and each reject in different ways the direct applicability of WTO provisions, but also because they have administrative mechanisms of enforcement, an element with possible use as an instrument for private parties.

A. *The United States of America* ⁽⁷²⁾.

A.1. *The negative answer of the implementing Act of 1994.*

The Uruguay Round Agreements Act of 1994 is very clear as to the intent of Congress to deny direct applicability to the provisions of the Agreements. It establishes that private litigants cannot use the provisions of the Uruguay Round Agreements to challenge any federal or state law. In this sense, along with a general denial of direct applicability, the Act provides that no other person except the United States "shall have any cause of action or defense under any of the Uruguay Round Agreements" ⁽⁷³⁾. The Agreements are not susceptible of being used to challenge "any action or inaction of the United States, any state, or any political subdivision of a state on the ground that such action or inaction is inconsistent" ⁽⁷⁴⁾ with WTO law.

(72) See, generally, the excellent article of David W. LEEBRON, *Implementation of the Uruguay Round Results in the United States*, in *Implementing the Uruguay Round*, *supra* note 20, at page 175. For a discussion of the status of GATT in U.S. domestic law see John H. JACKSON, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 *Michigan Law Rev.* 249 (1967); Robert E. HUDEC, *The Legal Status of GATT in the Domestic Law of the United States*, in *The European Community and GATT* (Hilf, Jacobs and Petersmann eds., 1986); the articles of Ronald A. Brand, *supra* note 16; T.W. FRANCE, *The Domestic Legal Status of the GATT: The Need for Clarification*, 51 *Wash. & Lee L. Rev.* 1481 (1994).

(73) Section 102, URAA, 19 USC s. 3512.

(74) Section 102 (c) (1), URAA, 19 USC s. 3512 (c) (1).

A.2. *Administrative mechanisms: Section 301 U.S. Trade Act.*

It is not my intention here to thoroughly analyze the meaning and evolution of Section 301, introduced by the 1974 Trade Act ⁽⁷⁵⁾. Instead, I would like to remark on an aspect that may be seen as one of the most important normative foundations of this mechanism, i.e., providing a voice for private parties in international trade law ⁽⁷⁶⁾. Having that point in mind, I will pose two questions: First, whether the WTO law is in open contradiction with Section 301 so as to oblige the U.S. to derogate or modify it. Second, what the limits of that law and its practical consequences are when interpreted as a voice for private parties.

Letting alone antipathetic attitudes toward this administrative mechanism, especially in relation to the rejection of unilateralism and the ambiguity of the idea of reasonableness as a possible

(75) Section 301 of the US Trade Act of 1974, 19 U.S.C. §§2411-2420 (1994). For analysis and commentary on Section 301 procedures see: Judith BELLO and Alan F. HOLMER, *GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301*, 26 *International Lawyer* 795 (1992); ID., *Section 301 of the Trade Act of 1974: Requirements, Procedures and Developments*, 8 *Northwestern Journal of International Law and Business* 633 (1988); ID., 'Section 301': *Its Requirements, Implementation and Significance*, 13 *Fordham International Law Journal* 260 (1989-1990); ID., *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301*, in *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System* 49 (J.N. Bhagwati and H.C. Patrick eds., 1990); ID., *The Post-Uruguay Round Future of Section 301*, 25 *Law and Policy in International Business* 1297-1309 (1994); ID., *US Trade Law and Policy Series No. 10: Significant Recent Developments in Section 301 Unfair Trade Cases*, *International Lawyer* 211-232 (1987); A. Lynne PUCKET and William L. REYNOLDS, *Rules, Sanctions and Enforcement under Section 301: At Odds with the WTO?*, 90 *A.J.I.L.* 675 (1996). Julia Christine BLISS, *The Amendments to Section 301: An Overview and Suggested Strategies for Foreign Response*, 20 *Law & Pol'y Int'l Bus.* 501 (1989); Alan O. SYKES, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 *Law & Pol'y Int'l Bus.* 263 (1992). See also Myles GETLAN, *TRIPs and the Future of Section 301: A Comparative Study in Trade Dispute Resolution*, 34 *Columbia Journal of Transnational Law* 173 (1995).

(76) I am not saying that the Congress had in mind this ground to approve the law. A fact that does not impede to include this or other normative arguments to support or attack that law. For a normative analysis of Section 301 see Kenneth W. ABBOTT, *Defensive Unfairness: the Normative Structure of Section 301*, in 2 *Fair Trade and Harmonization* 415 (Jagdish Bhagwati and Robert E. Hudec eds. 1996).

foundation of the United States Trade Representative's actions, I believe that the law of Section 301 is still valid after the WTO Agreements entered into force. According to what I have said in the second part of this study, Section 301 is not absolutely invalid in international law because the U.S. Administration has alternatives to conform its conduct to international law ⁽⁷⁷⁾. Nevertheless, Article 23 of the Dispute Settlement Understanding, in an effort to strengthen the multilateral system, has limited the discretionary powers of Member States to "seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements," because in these cases "they shall have recourse to, and abide by, the rules and procedures of this Understanding." Therefore, Member States shall respect the procedures set up by the Organization when reacting against inconsistent conduct of other Member States ⁽⁷⁸⁾, and arguably have much more

(77) See *supra* notes 6-9. See David Leebron, *supra* note 28, at 17 (affirming that "there is nothing in Section 301 itself that would require action in violation of Article 23 of the Dispute Settlement Understanding"). In relation to the European Community, Giorgio Gaja has recently said that "whenever the Community or national authorities are bound by a Community act to take conduct which entails the international responsibility of the Community, the act in question appears to be invalid. The act is on the contrary not invalid if it leaves the implementing (Community or national) authority some discretion that could be used in order to avoid committing a wrongful act". Giorgio GAJA, *Some Reflections on the European Community's International Responsibility*, in *The Action for Damages in Community Law* (T. Heukes and A. McDonnell eds. 1997).

(78) The introduction of this norm has been interpreted as an integration of the systems of self-help measures in the WTO system. For a defense of this view, see the study of Dr. Javier Fernández Pons, included in this book. Besides, one may also ask if the improvement of effectiveness that results from this integration in a much more efficient dispute settlement system will feed new discussions about the self-contained character of the WTO regime. On this subject, see Michael J. HAHN, *Die einseitige Aussetzung von GATT-Verpflichtungen als Represalie* 158-163 (1996); Laurance BOISSON DE CHAZOURNES, *Les contre-mesures dans les relations internationales économiques* 182 (112); Petros C. MAVROIDIS, *Das GATT as "self contained" Regime*, *Recht der internationalen Wirtschaft* 497 (1991). For a general discussion of the concept from the point of view of an international law professor, see Bruno SIMMA, *Self-Contained Regimes*, 16 *Netherlands Yearbook of International Law* 111 (1985). And for a general discussion on the impact of secondary rules on the unity and efficacy of international law, see *Diversity in Secondary Rules*

freedom to act against non Member States under general international law.

The Uruguay Round Agreements Act made minimal reforms to Section 301. It affirmed that, unless specifically provided for in the Act, nothing in it shall be construed "to limit any authority conferred under any law of the United States, including Section 301 of the Trade Act of 1974". As Leebron has said, "the only concession made in the United States implementing legislation is to conform the Section 301 timetable to the GATT dispute settlement timetable, so that the United States Trade Representative can await the results of those procedures before making any determinations or imposing any sanctions" (79).

As to the second question, I see at least two hurdles to the construction of Section 301 as a means to empower private parties and their rights in international trade law. The first limitation is that Section 301 serves only to attack. Indeed, this mechanism has been set up to contribute to the opening of foreign markets and act against unfair trade practices of foreign governments. Consequently, although those achievements could give a voice to private parties and leave them better off, Section 301 does not reflect a general concern for the protection of individuals within the United States (80). The second limitation comes to mind when we realize that individuals are to a large extent at the mercy of the administration's discretionary powers.

A.3. *The role of courts.*

Some authors have tried to give examples of interpretation and application of GATT norms in U.S. courts (81), but their illustrations do not amount to a serious consideration of those provisions by either federal or state courts. The role of U.S. courts in the

and the Unity of International Law (L.A. Barnhoorn and K.C. Wellens eds. 1995).

(79) LEEBRON, *supra* note 28, at page 17.

(80) Leebron explains how "Congress has sought to minimize the remedies (including defences) available to [private parties]" within the United States domestic legal system. *Supra* note 72, at page 176.

(81) See the studies of Ronald Brand cited at *supra* note 16.

judicial review of international trade law shows that "as to some matters, the U.S. system may be less rule governed and more discretionary than it would first appear" (82). This situation is due particularly to doubts about the place of domestic courts in the enforcement of international trade law. There are also general obstacles to a more active role (83), as well as concrete hurdles such as the statutes of implementation of international trade law.

In any event, because of the well established principle that interpretation of domestic law should be consistent with international obligations (84), American courts may give general legal effect to Uruguay Round Agreements through an interpretation. Nevertheless, this general interpretative principle is of course limited by any Congressional legislation that may contradict WTO provisions or any authoritative interpretations by WTO organs (85).

B. *The European Community* (86).

B.1. *The negative answer of the implementing instrument's Preamble.*

After the signature of the Final Act Enbodying the Results of the Uruguay Round of Multilateral Trade Negotiations on 15 December

(82) John H. JACKSON, William J. DAVEY and Alan O. SYKES, *Legal Problems of International Economic Relations* 1219 (1995).

(83) For example, one potential obstacle is whether the courts should interfere with the United States' President and Congress in foreign affairs.

(84) See *Restatement (Third) of The Foreign Relations Law of the United States* §114 (1987), and the cases cited in the Reporters' Notes.

(85) LEEBRON, *supra* note 72, at page 212.

(86) On the implementation of the Uruguay Round Agreements in the European Community see, generally, the splendid article of Peter L.H. VAN DEN BOSSCHE, *The European Community and the Uruguay Round*, in *Implementing the Uruguay Round* *supra* note 20, at page 23. See also Piet J. KUIJPER, *The Conclusion and Implementation of the Uruguay Round Results by the European Community*, *supra* note 26; C.W.A. TIMMERMANS, *L'Uruguay Round: sa mise en oeuvre par la Communauté européenne*, 4 *Revue du Marché Unique Européen* 177 (1994); Piet EECKHOUT, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 *C.M.L. Rev.* 11 (1997). For an account of the history of the substantive negotiations from the EC point of view, see Hugo PAEMEN and Alexan-

1993, the EC Commission made its proposal ⁽⁸⁷⁾ to the Council under Article 228 (3) EC Treaty for the conclusion of those results. After the assent of the European Parliament ⁽⁸⁸⁾, on 22 December 1994, the Council adopted Council Decision 94/800/EC, concerning "the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986-1994)" ⁽⁸⁹⁾.

In its Decision, the Council took care to insert a preambular declaration to the effect that the WTO Agreements, "by its nature", could not be invoked directly before the courts of the European Community or its Member States. This declaration had been proposed by the Commission ⁽⁹⁰⁾, and was not objected to by the Parliament. The justification of the denial of direct applicability stemmed from the fact that the absence of a negative solution would have put the Community in an unequal and unfavourable situation ⁽⁹¹⁾ in comparison with the other major trading partners which

dra BENSCH, *From the GATT to the WTO: the European Community in the Uruguay Round* (1995). For a most suggestive article on several issues about the relationship between WTO and the EC, including the problem of direct applicability, see Antonio Remiro BROTONS, *Pelagattos y Aristogattos de la Comunidad Europea ante el reino de la OMC*, 26 *Gaceta Jurídica de la CE* 7 (1996). And for a general account on the position of international law in the European Community system, see Javier Díez HOCHLEITNER, *La posición del Derecho internacional en el ordenamiento comunitario* (1998).

(87) *Proposal for a Council decision concerning the conclusion of the results of the Uruguay Round of Multilateral Negotiations*, COM(94) 143 final.

(88) This assent is required by Article 228 (3), second paragraph. See the Report on the proposal for a Council Decision concerning the conclusion of the results of the Uruguay Round of multilateral trade negotiations (Rapporteur: Mrs. Randzio-Plath), A4-0093/94, PE 208.916/fin. On the supervision of the European Parliament over the external competences of the European Communities see, generally, Margarita A. ROBLES, *El control de la política exterior por el Parlamento Europeo* (1994).

(89) Official Journal L 336/1, 23 December 1994. Of course, this is only one of the various implementing legislation adopted by the Council as a consequence of the modifications needed after the conclusion of the Uruguay Round Agreements. See Van den Bossche, *supra* note 86, at pages 84-92.

(90) COM(94) 143 final.

(91) On the resultant imbalance as a justification, see Piet J. KUIJPER, *The New WTO Dispute Settlement System: The Impact on the Community*, *supra* note 26, at pages 102-106.

had ruled out any kind of invocability by private parties, as we have already seen in the case of the United States of America ⁽⁹²⁾.

B.2. Administrative mechanism: the Trade Barriers Regulation.

In the European Union context, the Trade Barriers Regulation ⁽⁹³⁾, which replaced the New Commercial Policy Instrument ⁽⁹⁴⁾, provides for some rights that permit private parties to complain about illegal trade practices of third countries (non-members of the European Union). Compared to the New Commercial Policy Instrument, the Trade Barriers Regulation improved the system with the incorporation of the third track, admitting individual companies as complainants along with Member States ⁽⁹⁵⁾ and private sectors (European industries). Besides, there has been an indirect improvement by "an external factor: the strengthening of the WTO dispute settlement procedure" ⁽⁹⁶⁾. As indicated in respect to the U.S Section 301, it is not my intention to examine the European administrative mechanism of international trade protection in an exhaustive manner ⁽⁹⁷⁾. On the contrary, I would like to inquire into the possibilities of seeing the Trade Barriers Regulation as a means to channel individual claims.

In the case of the Trade Barriers Regulation, unlike that of Section 301, the problem of retaliatory sanctions contradicting international law is not, in principle, an issue. One arrives at this

(92) See *supra* notes 72-74 and accompanying text.

(93) Council Reg. 3286/94, O.J. 1994, L 249/71.

(94) Regulation 2641/84, O.J. 1984, L 252/1.

(95) This track was never been used in the practice of the New Commercial Policy Instrument, since Member States seem to prefer other ways to make their cases, like for example Article 113 EC Treaty. See Marco M.J. BRONCKERS, *Private Participation in the Enforcement of WTO Law: The new EC Trade Barriers Regulations*, C.M.L.Rev. 299-302 (1996).

(96) *Id.*, at page 317.

(97) For the 1984 and 1994 European procedures, see Fernando CASTILLO DE LA TORRE, *The EEC New Instrument of Trade Policy: Some Comments in the Light of the Latest Developments*, CMLRev. 687-719 (1993); Marco C.E.J. BRONCKERS, *The Potential and Limitations of the Community's New Trade Policy Instrument*, in *Trade Laws of European Community and the United States in a Comparative Perspective* 133 (Paul Demaret, Jacques Bourgeois and Ivo van Bael eds., 1992); Marco C.E.J. BRONCKERS, *supra* note 95.

conclusion after noticing that the Trade Barriers Regulation expressly provides that the actions taken under its authority must be in accordance with international law.

As an administrative instrument capable of protecting private interests, the Trade Barriers Regulation — like Section 301 — is limited; it only allows private parties to encourage the Commission of the European Communities to initiate investigations over foreign inconsistencies with WTO law, and the discretionary powers of the Community to press any investigation forward are broad. However, as noted, there are some elements that make the Trade Barriers Regulation an attractive means for individual claims. First of all, it should be noted that the Trade Barriers Regulation, unlike the New Commercial Policy Instrument, allows individual claims (the so-called third track) and not only claims made by European industries and Member States. Second, although the administrative procedural phases established by the Trade Barriers Regulation remain untouched ⁽⁹⁸⁾, the discretionary power of the Community is more limited than the one set up by Section 301 in the U.S. system, because the European Court of Justice has jurisdiction to review the Commission's decision not to open or continue an investigation. This had only occurred once in the *Fediol III* case, in which the Court had to review an individual complaint against the non-admissibility of its petition by a decision of the Commission under the New Commercial Policy Instrument ⁽⁹⁹⁾.

B.3. *The European Court of Justice and direct applicability: case law concerning GATT 1947 and its validity after the WTO Agreements.*

The European Community's legal order is a system governed by a peculiar doctrine of hierarchies that define the interrelationship between EC law and the domestic legal orders of the Member States.

(98) The four phases are: review of the admissibility of the complaint, internal investigation, international dispute settlement, and retaliation.

(99) Case 70/87, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission*, [1989] E.C.R. 1781. The Court decided that the Commission proceeded legally.

As regards international law, such a reality is not exactly the same and, as illustrated by the Court's case law concerning GATT 1947, this fact justifies a substantive case by case study. In particular, Article 228.7 does not indicate the capability of direct application of all kinds of international agreements ⁽¹⁰⁰⁾ in an absolute way. Ehlermann ⁽¹⁰¹⁾ has expressed this idea elegantly by affirming that "directly effective Community legislation can be invoked by individuals; international agreements, on the other hand, may lack such effect". An example of the latter is the GATT 1947. Indeed, the General Agreement has been denied direct effect by the European Court of Justice since the leading case *International Fruit Company* in 1972. In that case, the European Court of Justice rejected direct effects of GATT's provisions because of "the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties" ⁽¹⁰²⁾. The progeny of *International Fruit Company* has also been consistent in denying the direct applicability of GATT 1947 provisions ⁽¹⁰³⁾, not only in cases brought about through the reference proceedings of Article 177 EC Treaty, but also in a case where

(100) See Article 228.7 EC Treaty and case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie*, [1982] E.C.R. 3641.

(101) Claus DIETER EHLERMANN, *Application of GATT Rules in the EC*, in *The European Community and GATT* (Meinhard Hilf, Francys Jacobs and Ernst-Ulrich Petersmann eds., 1986) at 134.

(102) Cases 21-24/72, *International Fruit Company and others v. Produktschap voor Groenten en Fruit* [1972], E.C.R. 1219, at p. 1227.

(103) Case 9/73, *Carl Schlüter v Hauptzollamt Lörrach*, [1973] E.C.R. 1135; case 38/75, *Nederlandse Sjoenregen v. Inspecteur der invoerrechten en accijnzen*, [1975] E.C.R. 1439; case 266/81, *Società Italiana per l'Oleodotto Transalpino (SIOT) v. Ministero delle Finanze dello Stato* [1983] E.C.R. 731; cases 267-269/81, *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)*, [1983] E.C.R. 801; cases 290-291/81, *Compagnia Singer SpA and Geigy SpA v. Amministrazione delle Finanze dello Stato* [1983] E.C.R. 847; case C-280/93, *Germany v. Council* [1994] E.C.R. I-4973; case C-469/93, *Amministrazione delle Finanze dello Stato v. Chiquita Italia SpA* [1995] E.C.R. I-4533. For example, in this last case, the European Court of Justice said that the GATT 1947 Agreement does "not contain provisions of such a nature as to confer rights on individuals which they could rely on before national courts in order to challenge the application of conflicting national provisions".

one Member State tried to challenge a Council Regulation through Article 173 EC Treaty ⁽¹⁰⁴⁾. This case-law admits of only two exceptions: first, enforceability will be accepted for those cases in which the Community intends to implement a particular obligation provided by GATT law ⁽¹⁰⁵⁾; second, direct applicability will be honored if an express reference is made to a particular GATT provision by a Community act ⁽¹⁰⁶⁾.

The academic debate over the issue of direct applicability in relation to the GATT 1947 is immense, and I will not reproduce its details here ⁽¹⁰⁷⁾. Today, after the conclusion of the Uruguay Agreements, one should pose the question of "... whether the provisions of the GATT, as amended by the implementation of the Uruguay Round Agreements, are capable of being directly effective in the EC" ⁽¹⁰⁸⁾. In the field of academic discussions, although everyone

(104) On these proceedings see, generally, Henry G. SCHERMERS and Denis WAELBROEK, *Judicial Protection in the European Communities* (5th ed. 1992).

(105) Case 70/87, *Fédération del'industrie de l'huilerie de la CEE (Fediol) v. Commission*, [1989] E.C.R. 1781.

(106) Case C-69/89, *Nakajima All Precision Co. Ltd. v. Council* [1991] E.C.R. I-2069. Eeckhout, in a very interesting article, has called this "the principle of implementation". See Piet Eeckhout, *supra* note 86, at page 56.

(107) The most extensive study of this subject belongs to Kees Jan KUILWIJK, *The European Court of Justice and the GATT Dilemma: Public Interest versus Individual Rights?* (1996) (suggesting that Articles I, II, III and XI be used as a standard of review in the European Court of Justice). See my review of Kuilwijk's book: Carlos D. ESPÓSITO, *Direct Effect and Direct Applicability of WTO by the European Court of Justice. With a Dantesque Metaphor*, *Berkeley Journal of International Law* (forthcoming Fall 1998). Apart from the authors cited in *supra* note 86, see Paolo MENGOZZI, *Les droits des citoyens de l'Union européenne des accords de Marrakech*, 4 *Revue de Marché Unique Européen* 145 (1994); Philippe MANIN, *A propos de l'accord instituant l'Organisation mondiale du commerce et de l'accord sur les marchés publics: la question de l'invocabilité des accords internationaux conclus par la Communauté européenne*, 33 *Revue Trimestrielle du Droit Européen* 399 (1997); Miquel MONTAÑA MORA, *Equilibrium: A Rediscovered Basis for the Court of Justice of the European Communities to refuse direct effect to the Uruguay Round Agreements?*, 30 *Journal of World Trade* 43 (1996). Julio A. GARCÍA LÓPEZ, *Derecho económico internacional y relaciones privadas*, 44 *R.E.D.I.* 443 (1992). See also Talia EINHORN, *The Role of the Free Trade Agreement Between Israel and the EEC* (1994); *Id.*, *The Application of WTO Law by the Courts of Law in the EU and in Israel*, in *Essays on European Law and Israel* 1023 (A.M. RABELLO ed., 1996).

(108) Philip LEE and Brian KENNEDY, *supra* note 26, at page 68.

seems to accept the need to reconsider the problem after the entry into force of the WTO Agreements ⁽¹⁰⁹⁾, the solutions are still divided between those that propose the direct applicability of some GATT/WTO norms ⁽¹¹⁰⁾ and those that defend the non direct applicability of GATT/WTO ⁽¹¹¹⁾.

From the point of view of EC law, one of the most important constitutional episodes has been the introduction of the direct effects of Community law ⁽¹¹²⁾, and this was clearly a jurisprudential option ⁽¹¹³⁾ which began with the leading 1963 case *Van Gend & Loos* ⁽¹¹⁴⁾. While the doctrine of direct effects, so important to EC law, has been denied to GATT, the Court of Justice allows direct effect with other international agreements that are not much more precise and clear than some norms of the GATT. The latter fact has

(109) Ulrich EVERLING, *Will Europe Slip On Bananas?*, *C.M.L.Rev.* 401 (1996), at p. 422, note 45. Advocate General Otto Lenz made a similar point in his opinion in the case *Chiquita*, *supra* note 103, at paragraph 21: "I should add that these comments relate exclusively to the GATT in question here. What effects the agreement signed on 15 April 1994 setting up the World Trade Organisation could have in this respect need not be discussed here." Montaña Mora has underlined this point, *supra* note 107, at page 44, note 4.

(110) Besides the contributions of Kuilwijk (*supra* note 107), Petersmann (for example, *supra* note 25), Remiro Brotóns (*supra* note 86), and, to a limited extent, Mengozzi (*supra* note 107), see also Michael H. Hahn and Gunnar SCHUSTER, *Zum Verstoß von gemeinschaftlichem Sekundärrecht gegen das GATT: die gemeinsame Marktorganisation für Bananen vor dem EuGH*, 28 *Europarecht* 261 (1993); *id.*, *Le droit des états membres de se prévaloir en justice d'un accord liant la Communauté*, 100 *R.G.D.I.P.* 367 (1995).

(111) See KUIJPER, *The New WTO Dispute Settlement System: The Impact on the Community*, *supra* note 26. At p. 104 of this contribution, Kuijper admits that "there might be sufficient reason for the Court to change its view of the direct effect of the GATT after the entry into force of the WTO". However, he concludes that direct effect should not be granted.

(112) Professor Petersmann has studied and underlined this aspect of EC law in relation to GATT/WTO in several articles, see Ernst-Ulrich PETERSMANN, *National Constitutions, Foreign Trade Policy and European Community Law*, 3 *EJIL* 1 (1992); *id.*, *Proposals for a New Constitution for the European Union: Building-Blocks for a Constitutional Theory and Constitutional Law of the EU*, 32 *CML Rev.* 1123 (1992); *id.*, *International and European Trade and Environmental Law after the Uruguay Round*, *Academy of European Law* 135 (1991).

(113) See Pierre PESCATORE, *Aspectos judiciales del "acervo comunitario"*, *Revista de Instituciones Europeas* 351 (1981).

(114) Case 26/62, *Van Gend en Loos* [1963] ECR 12.

led former judge Pescatore to suggest that it appears that the Court has two approaches to the interpretation of international agreements depending on the kind of agreement that is under review: while GATT has been interpreted contextually, other agreements have been interpreted textually ⁽¹¹⁵⁾.

This study does not aim to examine this EC law issue, but I would conclude this section by summing up some ideas on the new elements introduced by WTO law and, most importantly, the alternatives to the European Court of Justice after the entry into force of the Marrakech law. As regards WTO law, without forgetting all its conciliatory qualities ⁽¹¹⁶⁾, one should accept that it has set up a much more effective system of dispute resolution, a system that has been strengthened by the creation of the Appellate Body and the implementation of the negative consensus for the adoption of Panel and Appellate Body reports. These improvements have been integrated into a new international organization, whose obligations are, in principle, more difficult to derogate from, as the new safeguards agreement demonstrate. These factors, combined with the sufficient precision of some GATT norms ⁽¹¹⁷⁾, could lead the Court of Justice to the conclusion that some WTO norms (and decisions) have direct effects ⁽¹¹⁸⁾. Nevertheless, the pervasiveness of some normative

(115) He is writing here about the interpretation of the Yaoundé Convention in *Bresciani* and the EEC/Portugal Free Trade Agreement in *Kupferberg*. Pierre PESCATORE, *Treaty-making in the European Communities*, in *The Effect of Treaties in Domestic Law*, *supra* note 4, 184-188. Professor Brand brought my attention to Pescatore's words, see Ronald A. Brand, *supra* note 16, at pages 591-592. Pescatore also says that "the case-law of the Court is in a state of profound and seemingly hopeless confusion as far as the problem of direct applicability of treaties is concerned." *Id.*, at page 184.

(116) See *supra* part III.A.

(117) See KUILWIJK, *supra* note 107; and the articles of Hahn and Schuster cited at *supra* note 110.

(118) Notwithstanding all these arguments, very well restated by the Advocate General G. Tessauro in his Conclusions of 13 November 1997, the Court dodge the question of direct applicability in the recent case 53/96, *Hermès International v FHT Marketing Choice BV*, judgement of 18 June 1998. At paragraph 35 of this judgement, the Court said: "It should be stressed at the outset that, although the issue of the direct effect of Article 50 of the TRIPS Agreement has been argued, the Court is not required to give a ruling on that question, but only to answer the question of interpretation submitted to it by the national court so as

arguments based on reciprocity, Community preference, equilibrium ⁽¹¹⁹⁾, plus the clear intent of the negotiators of the Uruguay Round and all the institutions of the European Communities, may encourage the European Court of Justice to abide by its precedents in denying direct applicability to GATT provisions. According to Lee and Kennedy, for example, "there is no evidence that it is the generally shared expectations of other WTO Member countries that the Agreement should be directly effective, and the prevailing position in both U.S and Japan law suggests otherwise. Hence it can be argued that the Court should not grant direct effect" ⁽¹²⁰⁾.

In my view, the ECJ's arguments denying direct effect to the WTO/GATT provisions are not unreasonable ⁽¹²¹⁾. Now, after the Council Decision 94/800/EC ⁽¹²²⁾, the question is whether the EC wants to unilaterally decide that GATT norms grant legal rights to individuals or whether it wants to abide by the general will of the member States and the European Community — expressed through the Council, the Commission, and the Parliament — and deny that GATT grants individuals such rights. Answering this question, the Court should take into account the issue of the allocation of powers ⁽¹²³⁾ within the European Union, and should also consider that direct applicability is not necessarily the only means to contribute to the better compliance of WTO law ⁽¹²⁴⁾.

to enable that court to interpret Netherlands procedural rules in the light of that article".

(119) See MONTANA MORA, *supra* note 107.

(120) Philip LEE and Brian KENNEDY, *supra* note 26, at page 87.

(121) See ECKHOUT, *supra* note 86.

(122) It has been said that "although such an official declaration possesses weight, it remains a unilateral opinion". Thomas Oppermann and José Christian Cascante, *Dispute Settlement in the EC: Lessons for the GATT/WTO Dispute Settlement System?*, in Petersmann ed., *supra* note 33, at page 483. See *supra* section B.1.

(123) For a discussion of self-executiveness as allocation of powers, see Carlos Manuel VÁZQUEZ, *The Four Doctrines of Self-Executing Treaties*, 89 A.J.I.L. 695, 697-700 (1995) (arguing that there are four doctrines of self-executing treaties instead of one: the intent-based doctrine, the justiciability doctrine, the constitutionality doctrine, and the private right of action doctrine).

(124) See Piet ECKHOUT, *supra* note 86.

5. Conclusion.

It is evident that individuals can be affected by GATT/WTO law ⁽¹²⁵⁾. One of the purposes of this study has been to demonstrate that the new context and provisions of the WTO law, although denying individuals access to its institutions, reflect a concern that transcends the mere interests of states and that the practice of the Panels and the newly created Appellate Body also takes into consideration the interests of private parties.

This fact, however, does not mean that WTO norms necessarily should be directly applicable, or that States must recognize the direct invocability of those norms by private parties. At the international institutional level, there is no mandatory provision requiring the direct applicability toward the Member States. With regard to this issue, I believe that one of the greatest barriers to the idea of direct applicability of GATT/WTO norms in domestic legal orders is the intent of the Members of the Organization ⁽¹²⁶⁾. Of course, the

(125) A problem that I have not consider in this paper is how individuals can affect WTO law causing a distortion of international trade. Restrictive business practices of private enterprises are an example of this case. Of course, one can argue that these practices are not covered by GATT 1994. Cf. Article 9 of GATS. For a discussion of the potentialities of Article 9 as "cross-fertilization" (in the fortunate expression of Professor Paolo Mengozzi), see the study submitted by Maria Chiara Malaguti to the 1997 Sessions of the Centre for Studies and Research of the Academy of International Law. See also Article 11:3 of the Agreement on Safeguards, providing that "Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1."

(126) In relation to this problem, one can ask the following question: What is the optimal level of legalization of WTO law? Professors Goldstein and Martin have argued that the optimal level of legalization of GATT falls short of full legalization. See Judith Goldstein and Lisa L. MARTIN, *Optimal Legalization in the GATT and WTO: Domestic Politics and Liberalization*. Draft prepared for the Conference on Domestic Politics and International Law, June 5-7, 1997, St. Helena, California. On file with C.D. Espósito. See also GEORGE W. DOWNS AND DAVID M. ROCKE, *Optimal Imperfection? Domestic Uncertainty and Institutions in International Relations* (1995). See also, Alan SYKES, *Mandatory Retaliation for Breach of Trade Agreements: some Thoughts of the Strategic Design of Section 301*, 8 *Boston International Law Journal* 301 (1990) (arguing that uncertainty about future demands of interest groups at the domestic levels resulted in the weak enforcement norm of GATT 1947). But see Petersmann, *supra* note 25, at page

difficulty with the intent-based discourse is, perhaps, that its limits are not always clear and depend on the context, the substantive norms and the subsequent practice of the organs in charge of WTO law enforcement.

At the domestic level, the question is how the States should comply with international trade obligations. In this context of plurality of orders, States are competent to decide what are the best ways to comply with international trade law. Accordingly, almost all the major trade powers adopt a negative enforcement solution in relation to private parties. Besides the systemic considerations, that may need some revision, states can still opt for that solution based on policy and right-based considerations ⁽¹²⁷⁾, which could include reciprocity ⁽¹²⁸⁾, respect for the constitutional allocation of power ⁽¹²⁹⁾ between governments and parliaments, the principle of equilibrium ⁽¹³⁰⁾ in the balance of rights and obligations in interna-

52 (comparing it to the 'GATT à la carte' system, "the institutions of and decision-making powers of the WTO reflect the goal of inducing countries to take a broader 'systemic view' of their general interests and to avoid mutually harmful, non-cooperative behavior") and 36-41 on the 'prisoner's dilemma' and international trade.

(127) See John H. JACKSON, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, *supra* note 39. Lee and Kennedy, analysing the issue in relation to the Court of Justice of the EC, seem to adhere to the idea of a denial of direct effect on "quasi-political considerations." *Supra* note 26, at page 89.

(128) For the debate on reciprocity toward GATT enforcement in the European Community, Paolo MENGOZZI, *Les droits des citoyens de l'Union européenne des accords de Marrakech*, 4 *Revue de Marché Unique Européen* 145 (1994); *id.*, *The Marrakech Agreements and its Implications on the International and European Level*, in *The Uruguay Round Results: A European Lawyers' Perspective*, *supra* note 8; Kuijper, *supra* note 26, at 106 (arguing that there should be the same internal enforcement of the WTO in each Member country). *Contra* Ernst-Ulrich PETERSMANN, *Application of GATT by the Court of Justice of the European Communities*, 20 *CML Rev.* 397, 433 (1983) (arguing that the principle of reciprocity is conceived for a bilateral framework); KUILWIJK, *supra* note 107, at pages 110-118 and 126-131 (distinguishing two kinds of reciprocity: the reciprocity as an initial balance of obligations and reciprocity in enforcement, which occur at diverse momentum). For a general analysis on reciprocity in the EC, see G. WILS, *The Concept of Reciprocity in EEC Law: An Exploration Into These Realms*, 28 *C.M.L. Rev.* 245 (1991).

(129) Carlos Manuel VÁZQUEZ, *supra* note 17, at pages 697-700.

(130) Miquel MONTANA-MORA, *supra* note 107.

tional trade relations, and the possible detrimental effects of granting direct applicability ⁽¹³¹⁾.

Notwithstanding all these grounds for denying the direct applicability of WTO law, one should not forget that, on the one hand, some provisions of the Agreements which are of a procedural nature should be transposed to the Member States' domestic legal orders ⁽¹³²⁾, and, on the other hand, other provisions of a substantive character have been implemented in the domestic legal orders of the WTO Members. There are also some provisions that can be considered sufficiently precise and clear and could be directly applied if WTO Members allow the possibility. In discussing the issue, one should also have in mind that direct applicability is not the only way to achieve compliance with international trade obligations, and that it is not necessarily an all or nothing problem, because it not only admits of indirect controls through administrative mechanisms which are open to individual complaints, but also allows for the implementing principle ⁽¹³³⁾ and the principle of international law that interpretation should be in conformity with international obligations ⁽¹³⁴⁾.

The WTO will still be significant without being fully operative as regards private parties. In this sense, one should remember that compliance and effectiveness may have different meanings. Thus, in relation to direct applicability, the question is whether the WTO will be a better organization including private parties as subjects of its law who can invoke WTO law before national (and international) courts. Nowadays, domestic systems have broad discretion to decide

(131) LEE and KENNEDY, *supra* note 26, at page 88. These authors give the example of the United States-Japan agreement on cars and talk of a "double jeopardy: a State having already made concessions in other fields may then also be forced to withdraw the measure impugned by its national court".

(132) See *supra* section III.B.

(133) ECKHOUT, *supra* note 86; and the reference to the principle of implementation made at *supra* note 106 and accompanying text.

(134) For the doctrine of consistent interpretation in the EC, see case C-61/94, *Commission v. Federal Republic of Germany*, [1996] ECR I-3989. See Eeckhout, *supra* note 86, at pages 40-42; and Diez-Hochleitner, *supra* note 86, at pages 40-42. For this doctrine in the US legal system, see *supra* notes 84-85, and accompanying text.

the issue of direct applicability of international trade provisions. However, as professor Hilf has noted, those legal systems should at least take the rights of the individuals seriously and treat them in accordance with the basic rule of non-discrimination under a given trade law structure ⁽¹³⁵⁾.

(135) Mainhard HILF, *supra* note 22, at page 325.

MARIE WYNTER (*)

THE AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES IN THE LIGHT OF THE WTO DECISIONS ON EC MEASURES CONCERNING MEAT AND MEAT PRODUCTS (HORMONES)

SUMMARY: PART I - THE EUROPEAN BAN ON THE USE OF GROWTH PROMOTING HORMONES ON BEEF PRODUCTION. — 1. Motivations for a hormone ban. — i) consumer fears. — ii) trade pressure - formation of the common market. — 2. Reactions to the ban. — i) the United States. — ii) Canada. — iii) Third Parties. — PART II: THE SPS AGREEMENT AND THE HORMONE RULINGS. — 3. The Applicable Law. — 3.1. Choosing the correct Agreement: the *SPS Agreement*, Article XX and implications for environmental protection. — 4. The Burden of Proof. — 5. The Standard of Review. — 6. The Importance of International Standards, Guidelines and Recommendations. — 6.1. Basing measures on international standards. — 6.2. The reification of international standards, guidelines and recommendations. — 7. The Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection. — 8. Consistency of Levels of Protection and Resulting Discrimination or Restriction on International Trade. — 8.1. De-coupling the jurisprudence of the *SPS Agreement* and the GATT. — 8.2. The precautionary principle. — 8.3. The effect of the hormone ruling. — Conclusion.

The complaints brought separately by the United States and Canada concerning Measures imposed by the European Communi-

(*) The law in this article is current as of April 1998. The opinions expressed in this article are my own and do not necessarily represent the views of the Australian Government. This paper is based on a previous paper M. WYNTER, *Beefing Up our Trade: Environmental Concerns and Rural Exports* (1997) *Rural Australia Towards 2000 Conference*, Centre for Rural Social Research, Charles Sturt University, Australia, 2-4th July, updated to appear as "Global trade, environmental concerns and rural exports" in Robertson, A.I. and R.J. Watts (eds.) (1999). *Preserving Rural Landscapes: Issues and Solutions*. CSIRO Publishing, Melbourne, in press.

ties restricting the importation of meat and meat products ⁽¹⁾, have given the World Trade Organization (WTO) dispute settlement body its first opportunity to consider the application of the *Agreement on Sanitary and Phytosanitary Standards* ⁽²⁾ (*SPS Agreement*), introduced as part of the package of Agreements forming the WTO ⁽³⁾. The WTO Panel and Appellate Body Reports together provide a detailed treatment of both Articles 3 and 5 of the *SPS Agreement*, and their interrelationship. They also provide guidance upon how the *SPS Agreement* and the *General Agreement on Tariffs and Trade* 1994 (GATT), in particular Article XX, are linked. Importantly, the WTO has clarified that the *SPS Agreement* is a *free-standing* agreement and no *prima facie* case of discrimination or different treatment need be shown for an *SPS Agreement* investigation to take place.

In an attempt to halt the burgeoning use of environmental standards and consumer health and safety standards being used as protectionist non-tariff barriers ⁽⁴⁾, the *SPS Agreement* codifies the manner in which Members may impose these standards where they affect international trade.

Ziegler describes the *SPS Agreement* as introducing "a new generation of integration measures into the world trading system by restricting domestic measures to proportionate and necessary measures despite their equal application to domestic and traded

(1) Report of the Panels on *EC Measures Concerning Meat and Meat Products (Hormones)* - Complaint by the United States, WT/DS26/R/USA, 18 August 1997 (hereinafter referred to as the US Panel Report); complaint by Canada, WT/DS48/R/CAN, 18 August 1997 (hereinafter referred to as the Canada Panel Report); and Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R.

(2) *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 15 April 1994, 33 ILM 1140 (1994), Annex 1A(4).

(3) *Marrakech Agreement Establishing the World Trade Organization*, opened 15 April 1994; in force generally on 1 January 1995, 33 ILM 1144.

(4) From a position where the GATT was traditionally very reluctant to limit national sovereignty regarding standards for sanitary and phytosanitary protection, the Uruguay Round saw as one of its major objectives the "minimi[sation of] the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture". Ministerial Declaration launching the Uruguay Round MTN.GNG/NG5/W/41, in Patterson, E. (1990). "International efforts to minimize the adverse trade effects of national sanitary and phytosanitary regulations". *Journal of World Trade* 24: 91-102 at 94.

goods" (5). This proposition is to some extent supported by the WTO Panel and Appellate Body findings in the Hormone Reports, where despite the European Communities' Measures being non-discriminatory on their face, they have been found to be inconsistent with the *SPS Agreement* because they are not properly based on a risk assessment contra Article 5.1.

The *SPS Agreement* does not use the language of proportionality. Instead it relies on the tools of risk assessment to integrate measures into the world trading system and also introduces the goal of consistency between measures in their application to domestic and traded goods. Consistency does not have to be perfect, but extends beyond analysing the treatment of like products to between comparable products and situations. The Appellate Body adopted a considerably more limited interpretation of this concept than was put in submissions (6), however its decision will have far-reaching implications for the design of existing and future environmental standards and consumer health and safety standards.

Part I of this paper describes the introduction of the European Communities' Measures and the ensuing trade dispute which resulted in the formation of two WTO Panels to consider the Measures. Part II analyses the interpretation of the *SPS Agreement* made by the WTO in the Panel and Appellate Body Reports. This paper concludes that the Appellate Body Report in particular demonstrates a cautious and legally oriented approach to interpreting the *SPS Agreement* in line with the philosophical approach of the new WTO dispute resolution body. Nonetheless, the Appellate Body has not lost sight of the human dimension and political realities of the dispute and has produced a report which not only clarifies important aspects of the *SPS Agreement* within the WTO legal context, but contrives to be persuasive to those most affected within the European Communities.

(5) A.R. ZIEGLER (1996). *Trade and Environmental Law in the European Community*. Oxford, Clarendon Press.

(6) Canada submitted that Article 5.5 requires risks to be analysed for consistency across "all the different sanitary risks posed to *human health* contemplated by the *SPS Agreement*, i.e., those arising from different sources, or causing different adverse health effects" at para 3.292 Canada Panel Report.

PART I

THE EUROPEAN BAN ON THE USE OF GROWTH
PROMOTING HORMONES ON BEEF PRODUCTION1. *Motivations for a hormone ban.*i) *consumer fears.*

During the 1970's, reports from Italy came to the public's attention of babies developing secondary sexual characteristics, such as growing breasts and menstruating ⁽⁷⁾. These reports confirmed the worst fears of consumers worried about the use of additives, including growth promoting hormones, in livestock production. The growth abnormalities were attributed to high levels of *Diethylstilbenes* (DES), a synthetic growth hormone, which was found to be present in veal extract baby food ⁽⁸⁾, however a definitive link between the presence of the hormone and the abnormal growth was never scientifically proven ⁽⁹⁾. It is important to note that the *DES* found had been used illegally, and no doubt administered incorrectly. It was a clear case of hormone abuse.

DES was used in the treatment of pregnant women and was used as a livestock feed additive until the late 1970's ⁽¹⁰⁾. Following demonstration of the carcinogenic effects of DES in both humans and laboratory animals, the use of DES was gradually banned in

(7) See e.g. M.B. FROMAN (1989). *Recent Developments in International Trade: The United States - European Community Hormone Treated Beef Conflict*. *Harvard International Law Journal* 30: 549-556; A.R. HALPERN (1989). *The US-EC hormone beef controversy and the Standards Code: implications for the application of health regulations to agricultural trade*. *North Carolina Journal of International Law and Commercial Regulation* 14: 135-155. Reports also emanated from France of hormone abuse, however the reports from Italy were most striking. See Part 2.4 of the US Panel Report.

(8) USDA (United States Department of Agriculture). (1987). *Economic Impact of the European Economic Community's Ban on Anabolic Implants*. Washington, DC; M.B. FROMAN (1989) *supra* note 7.

(9) M.B. FROMAN (1989) *supra* note 7; D. VOGEL (1995). *Trading Up: Consumer and Environmental Regulation in a Global Economy*. Cambridge, Massachusetts, Harvard University Press.

(10) US Panel Report at para 4.123 n. 79; M.B. FROMAN (1989) *supra* note 7.

Europe and the United States ⁽¹¹⁾. The public became increasingly concerned as to the increasing use of illicit DES, and Italian and French reports prompted widespread boycotts on veal in Europe and strong calls for further bans on hormones in the beef industry ⁽¹²⁾. The boycotts had a considerable effect upon the sale of beef, for example the French Federal Consumers Union Boycott led to a 70 percent decline in purchases ⁽¹³⁾.

Part 2.4 of the US Panel Report details the responses made by the various arms of the European Communities in the wake of the consumer boycotts. From 1980 onwards, the EC Council of (Agriculture) Ministers, the EC Commission and the European Parliament took steps to signal their concern over the use of hormones for livestock production except in the case of therapeutic treatment. This included the adoption of a resolution, draft legislation and a report favouring the banning of growth hormones in livestock production (excluding therapeutic use). Yet it was not until 16 March 1988 that a valid Directive (88/146/EEC) was adopted by the EC Council which placed a total ban on the use of all growth hormones other than as treatment for therapeutic use ⁽¹⁴⁾. This was notwithstanding the costs for EC beef producers which compliance with the ban would involve ⁽¹⁵⁾.

During the interim period, the EC Council of Ministers adopted,

(11) US Panel Report at para 4.123 n. 79; D. VOGEL (1995) *supra* note 9. See T. COLBOURN, D. DUMANOSKI, et al. (1996). *Our Stolen Future*. London, Abacus, for details on the effects of DES on human health and fertility.

(12) US Panel Report at para 4.123 n. 79; D. VOGEL (1995) *SUPRA* NOTE 9, CITING A. BRAND & A. ELLERTON, *Report on Hormone-Treated Meat*. Brussels: Club de Bruxelles, 1989. Froman suggests that a complete ban was initially considered appropriate merely because it was easier to supervise, Froman, M. B. (1989) *supra* note 7.

(13) D. VOGEL (1995) *supra* note 9.

(14) On 31 December 1985 the EC Council adopted Directive 85/649/EEC which placed a total ban on the use of all growth hormones other than as treatment for therapeutic use, however it was annulled on procedural grounds when challenged in the European Court of Justice. United States Panel Report and Canada Panel Report, para 2.30.

(15) S. READ (1988) *The European Community Ban on the use of Hormone Growth Promotants: Implications for NSW Producers*, NSW Agriculture and Fisheries, Division of Rural and Resource Economics, at p. viii.

on 31 July 1981, a directive requiring the Commission to provide a report no later than 1 July 1984 on the effects of the natural hormones oestrogen (oestradiol-17 β), testosterone and progesterone, and the synthetic hormones trenbolone and zeranol ⁽¹⁶⁾.

The Scientific Working Group on Anabolic Agents in Animal Production, chaired by Dr. Lamming, was comprised of 22 scientists drawn from 10 European Communities countries ⁽¹⁷⁾ and "consulted with other EC technical advisory bodies, including the Scientific Committee for Food, ... 60 distinguished vets and food scientists in Europe" ⁽¹⁸⁾ as well as taking into account data from manufacturers ⁽¹⁹⁾.

The Working Group reported on 22 September 1982 its interim conclusions that "the use of oestradiol-17 β , testosterone and progesterone ⁽²⁰⁾ and those derivatives which readily yield the parent compound on hydrolysis after absorption from the site of application would not present any harmful effects to the health of the consumer when used under the appropriate conditions as growth promoters in farm animals". This report was well received by the EC Scientific Veterinary Committee, the EC Scientific Committee for Animal Nutrition and the EC Scientific Committee for Food, although each committee "stressed the need to lay down provisions regarding the establishment of proper programmes to control and monitor the use of anabolic agents with regard, in particular, to instructions for use, surveillance programmes and analysis methods" ⁽²¹⁾.

(16) Directive 81/602/EEC, US Panel Report at para 2.28. Canada Panel Report at 2.26. As stated in the Panel Reports, this was the EC Council's first directive on the issue.

(17) USDA (1987) *supra* note 8 at 13 referring to "Little hope seen for reversal of EC ban on hormones". *Food Chemical News* 28, No. 31 (6 October 1986): p. 3.

(18) D. VOGEL. (1995) *supra* note 9 at p. 154.

(19) USDA (1987) *supra* note 8.

(20) US Panel Report, para 2.29 quoting the *Report of the Scientific Group on Anabolic Agents in Animal Production* (the Lamming Report). See also D. VOGEL (1995) *supra* note 9 at p. 154; USDA (1987) *supra* note 8 at p. 14; Report EUR 8913 (1984).

(21) US Panel Report, para 2.29.

A further Working Group was set up in January 1984 to examine the safety of two synthetic growth hormones, zeranol and trenbolone. As in previous studies, manufacturers assisted in the studies with the International Minerals & Chemicals Corporation which produced Ralgro® (zeranol) initiating studies to provide further data on the safety of the growth hormones to consumers ⁽²²⁾.

On 12 June 1994, the European Commission proposed amending Directive 81/602/EEC by allowing the controlled use of the natural growth promoting hormones oestradiol, progesterone and testosterone in livestock production. It also proposed re-examining the ban on the two synthetic hormones following the completion of their scientific evaluation ⁽²³⁾. This proposal would have gone some way to satisfy the desire of the three member states (Belgium, Ireland and the United Kingdom) who wished to retain the use of hormones for growth promotion purposes, as well as the concerns of third party countries whose beef imports would be affected by the ban ⁽²⁴⁾. The EC Council of Ministers rejected the Commission's proposal, as did the EC's Economic and Social Committee and the European Parliament ⁽²⁵⁾. The EC Agricultural Committee also strongly supported a total ban on hormone use for growth promotion purposes ⁽²⁶⁾.

The Working Group made an interim report in 1984 to the effect that the synthetic growth hormones were "harmless for con-

(22) USDA (1987) *supra* note 8.

(23) US Panel Report, para 2.29. Canada Panel Report, para 2.27. See also Memorandum to US Department of State, Washington, DC, from US Mission, EEC Brussels. Subject: Commission Proposal Concerning the Use of Hormonal Substances in Livestock Production, July 2, 1984 in USDA (1987) *supra* note 8 at p. 15.

(24) US Panel Report, para 2.27. Canada Panel Report, para 2.25.

(25) See Economic and Social Committee, "Recommendation by the Economic and Social Committee". *Official Journal of the European Communities* (OJ No. C44), February 15, 1985; European Parliament, "European Parliament Decision". *Official Journal of the European Communities* (OJ No C288), November 11, 1985; Council Directive 85/649/EEC" *Official Journal of the European Communities* (OJ No. L 38822/228) in USDA (1987) *supra* note 8 at p. 16 for proposals that the ban be extended to include the natural growth promoting hormones.

(26) USDA (1987) *supra* note 8.

sumers" (27) but the Working Group's meetings were cancelled in 1985 by EC Commission before it issued its final report. According to Dr. Lamming, the "EC determined that no data was needed because of the impending ban" (28). The United States accused the European Communities of disbanding the Working Group to avoid the synthetic hormones also being declared of no harm to consumers (29).

The enquiries into hormone use and its effects on human and animal health did not end with the adoption of Directive 88/146/EEC in March 1988.

There were significant doubts within the scientific community as to the ability of the hormone ban to be properly enforced. Dr. Lamming reflected these concerns stating "The European Economic Community's ban on hormone use in calves will collapse because it is unscientific, impossible to police, and because it will lead to a huge black market across Europe in cattle implants" (30). At the Toxicology Forum, 22-26 September 1986, Dr A. Rico, France's Ecole Nationale Veterinaire suggested "... natural anabolic are impossible to control and control of the others [zeranol and trenbolone] is not easy"; Dr. Hutzman of Biosure Ltd, United Kingdom, said that producers had "a good chance of getting away with" violating the hormone ban if they so chose (31).

(27) D. VOGEL (1995) *supra* note 9 referring to *The Effects of Greater Economic Integration within the European Community on the United States: First Follow-Up Report* (Washington, DC: United States International Trade Commission, Publication 2268, March 1990).

(28) USDA (1987) *supra* note 8 at p. 14, quoting from Report EUR 9813 (1984) at p. 4.

(29) See "Hormone ban is technical trade barrier, US says in complaint". *Food Chemical News* 28, No. 50 (16 February, 1987) in USDA (1987) *supra* note 8 at p. 20.

(30) USDA (1987) *supra* note 8 at p. 17, quoted in "EEC Hormone Ban will collapse, Head of Scientific Group predicts" *Food Chemical News* 28, No.12, (26 May 1986), p. 17.

(31) USDA (1987) *supra* note 8 at p. 17, quoted in "Hormone Ban by EC seen unlikely to be reversed". *Food Chemical News* (6 October 1986), p. 6. In fact, a black market did emerge in growth promoting hormones. Reports from Belgium have told of hormone cocktails, some including DES, being injected intramuscularly, causing the meat at that site to be carcinogenic, S. READ (1988) *supra* note 15.

The Pimenta Report in 1988 rejected these concerns, reporting:

- The Committee did not accept the argument that prohibiting the use for growth promotion of some natural or nature-identical hormones would result in an increase in the use of other, more dangerous growth-promoting substances to the detriment of the consumer;

- 10 out of 12 national veterinary experts indicated that a total ban would facilitate implementation and control;

- The scientific conclusions regarding the use of natural hormones rested upon strict conditions of use which the Committee believed could not in reality be attained. The Committee was of the opinion that use of the natural/nature-identical hormones carried the risk of inexperienced application, incorrect dosage and unsupervised injection which could pose a risk to the animal and the consumer, and also noted doubts with regard to long-term cumulative and interactive potential carcinogenicity. In addition, the Committee believed that proven necessity and socio-economic desirability should be the criteria of acceptability for the use of (bio)chemical growth promoters in animal-rearing ⁽³²⁾.

The Pimeta Report was commissioned by the European Parliament as an enquiry into "the Problem of Quality in the Meat Sector", in particular the prevalence of the illegal use of growth-hormones within the European Communities and the manner in which to control it. The report recommended the maintenance and extension of the ban on hormones used for growth-promotion purposes, and was adopted by the European Parliament in March 1989.

In February 1989 the European Parliament adopted the Collins Report which recommended that the licensing system for hormones used for growth promotion purposes should be distinguished from that of the licensing system of hormones for therapeutic use because of the differing "social, agricultural and environmental" implications of the two uses ⁽³³⁾.

(32) US Panel Report, para 2.31. Canada Panel Report, para 2.29.

(33) European Parliament, Committee on the Environment, Public Health and Consumer Protection, Report on "The USA's refusal to comply with Community legislation on slaughterhouses and hormones and the consequences of this

Following the report of the EC Scientific Conference on Growth Promotion in Meat Production, held 29 November-1 December 1995, the European Parliament voted 366 to 0 in support of a resolution to maintain the ban ⁽³⁴⁾. This is notwithstanding that the Report of the Conference found that "At present, there is no evidence for possible health risks to the consumer due to the use of natural sex hormones for growth production" and "At the doses needed for growth promotion, residue levels [of trenbolone and zeranol] are well below the levels regarded as safe (the MRLs). There are, at present, no indications of a possible human health risk from the low levels of covalently-bound residues of trenbolone" ⁽³⁵⁾.

ii) *trade pressure - formation of the common market.*

For a single European market to be realised within Europe, there was an urgent need for the harmonisation, or mutual recognition, of standards applying to a range of products to occur. In the absence of this, bans, tariff and non-tariff barriers, and strict border controls would be the norm and the liberalisation of intra-community trade would be impossible. Thus, for the sake of community trade, the treatment of hormones had to be resolved ⁽³⁶⁾.

The fact that consumer health and safety was at issue meant that the mutual recognition of the different hormone standards required by community members was not acceptable. The different standards reflected, at least in part, the degree of risk each country thought the hormones represented. The Community had been in the process of negotiating a common veterinary standard. This became

refusal", EP 128 381/B, 7 February 1989 in US Panel Report, para 2.32. Canada Panel Report, para 2.30.

(34) 260 parliamentarians did *not* attend the vote. This is not necessarily indicative of their dissent.

(35) "Assessment of Health Risk - Working Group II", in 1995 EC Scientific Conference Proceedings, pp. 20-21 in US Panel Report, para 2.33. Canada Panel Report, para 2.31. The Conference invited 86 scientists to participate; it is unclear how many non-scientists participants were invited. The Conference tended to refuse applications to participate from manufacturers and distributors of growth hormones, although they were allowed to provide written submissions.

(36) D. VOGEL (1995) *supra* note 9.

more urgent as consumer awareness of food safety issues intensified ⁽³⁷⁾.

A ban on the importation of hormone-treated meat and animals prevented circumvention of the European hormone ban. Initially the ban was to apply from 1 January 1988. The time for the phasing in of non-hormone treated meat and animals was subsequently extended to 31 December, 1988, so that by then "all exporters to the EC [would] have adopted a position, by negotiation with the EC, which [would] be sufficient to guarantee that no meat or animal imported into the EC [had] ever had hormonal or thyrostatic substances administered within its lifetime" ⁽³⁸⁾. The phase-out of intra-community trade in hormone-implanted meat was extended until 1 April, 1988, allowing the last of the Community's hormone-treated and intervention stocks to be slaughtered and sold ⁽³⁹⁾.

The European Communities applied equal conditions for the prohibition of hormones used for growth promotion purposes in beef cattle production within the Community, and gave more favourable compliance conditions to importers of beef than for Community beef producers. The European Communities did not seek to influence how countries complied with, or proved their compliance with Community law. Rather, it allowed "each country to negotiate a control system suitable to their own infrastructure and production systems" ⁽⁴⁰⁾. The Community merely set a baseline standard in that "any controls adopted must be sufficiently stringent and effective so as to provide adequate guarantees, comparable to control methods adopted in EC Member States" ⁽⁴¹⁾.

Politics clearly influenced the adoption of a total ban. Consumer pressure against the hormone use was becoming increasingly intense

(37) D. VOGEL (1995) *supra* note 9.

(38) D. READ (1988) *supra* note 15 at p. viii.

(39) According to Read "[t]he Directive allowing this was passed on a majority vote, reputedly to reduce the likelihood of trade confrontation with the United States. Greece, Spain, Belgium and Italy all voted against the adoption of the directive and argued that there was no need to appease third country importers." D. READ (1988) *supra* note 15 at p. 5.

(40) D. READ (1988) *supra* note 15 at p. viii.

(41) D. READ (1988) *supra* note 15 at p. viii.

during this period, particularly in Italy, Belgium and France ⁽⁴²⁾. This pressure was enough to raise hormone tolerance standards in countries within the Community, but those standards were not uniform throughout the Community. The total ban removed the disruption to trade caused by the different standards, and the need for extensive border controls to ensure hormone treated beef was not imported from elsewhere ⁽⁴³⁾.

2. *Reactions to the ban.*

i) *the United States.*

The United States is heavily dependant upon the use of growth promoting hormones through all stages of livestock production. The use of natural hormones was already in place at the time of the hormone ban; zeranol marketed as Ralgro® had been approved in 1967 and trenbolone was approved in June 1987 ⁽⁴⁴⁾.

In 1986 and in 1991 the United States lobbied the *Codex Alimentarius Commission* to declare the hormone use safe ⁽⁴⁵⁾, however, despite the findings and recommendations of its technical committees, the *Codex* refused to make such a finding ⁽⁴⁶⁾.

(42) USDA (1987) *supra* note 8.

(43) D. VOGEL (1995) *supra* note 9.

(44) USDA (1987) *supra* note 8 at p. 18.

(45) See "Codex Committee is proper forum for Hormone Issue: Guest". *Food Chemical News* 29, No.3 (23 March 1987): p. 3 in USDA (1987) *supra* note 8. All five growth hormones banned by Europe had been approved by the Federal Drug Administration of United States, a body which has notoriously strict criteria.

(46) D. VOGEL (1995) *supra* note 9. The Joint Food and Agriculture Organization of the World Health Organization's Joint Expert Committee on Food Additives (JECFA) set Acceptable Daily Intake levels and Acceptable Residue Limits on a permanent basis for zeranol and on a temporary basis for trenbolone acetate. USDA (1987) *supra* note 8. The Committee did not set intake or residue limits for natural growth hormones estradiol-17 β , progesterone, and testosterone as residues "resulting from the use of these compounds as growth promoters in accordance with good veterinary and animal husbandry practice are unlikely to pose a hazard to human health." "JECFA asks for further data on trenbolone acetate by 1990" *Food Chemical News* 29, No. 22 (3 August 1987): p. 25, in USDA (1987) *supra* note 8 at p. 21. Likewise, the technical Committee on Residues of Veterinary Drugs in Food supported the United States position on the European ban, stating

In March 1987, the United States attempted to use GATT procedures to have the dispute resolved under the Tokyo Round *Agreement on Technical Barriers to Trade*, but was blocked from doing so by the Europeans.

On 1 January 1989, the United States invoked trade sanctions placing a 100 percent tariff against European goods to the value of US\$100 million which it claimed represented the loss of trade due to the ban ⁽⁴⁷⁾. Rather than imposing countervailing duties, which it considered doing, Europe decided in 1989 to head off a full scale trade escalation. It doubled the United States high-grade beef quota and "a joint US/EC Task Force agreed on certain measures which allowed imports into the European Communities of United States meat certified not to have been produced with hormones" ⁽⁴⁸⁾.

Although this led to some reduction in the sanctions applied by the US, they maintained other retaliatory sanctions and denied EU requests for a GATT panel to consider their validity ⁽⁴⁹⁾. The United States clearly did not abandon the GATT dispute settlement process as a way out of the hormone impasse; indeed Vogel and Steinberg suggest that the United States proposed strengthening the GATT rules on sanitary and phytosanitary standards during the Uruguay Round to deal with the hormone dispute ⁽⁵⁰⁾.

that it was "a classic example of a non-tariff barrier with no scientific basis whatsoever." A. BRAND, A. ELLERTON, *Report on Hormone-Treated Meat* (Brussels: Club de Bruxelles, 1989) in D.A. WIRTH (1994). *The role of science in the Uruguay Round and NAFTA trade disciplines*. *Cornell International Law Journal* 27: 817-859; D. VOGEL (1995) *supra* note 9.

(47) Section 301 Trade Act 1974 (United States), see M.B. FROMAN (1989) *supra* note 7; D. VOGEL (1995) *supra* note 9.

(48) US Panel Report, para 2.35.

(49) The European Communities requested the establishment of a WTO DSB panel to consider the legality of the sanctions on 19 June 1996, however following the establishment of the US Hormone Panel the United States withdrew its retaliatory measures. US Panel Report, para 2.35.

(50) D. VOGEL (1995) *supra* note 9; R.H. STEINBERG (1997). *Trade-environment negotiations in the EU, NAFTA, and WTO: regional trajectories of rule development*. *The American Journal International Law* 91 (April): 231-267. For a while the beef hormone dispute had threatened to severely disrupt the Uruguay Round negotiations as it was seen as symptomatic of the larger differences which the United States and the European Communities had over support to the agricultural sector. Even though the trade effects of the hormone ban amounted to

As set out in para 1.1 of the US Panel Report "On 26 January 1996, the United States requested consultations with the European Communities, pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article 11 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement"), Article 14 of the *Agreement on Technical Barriers to Trade* ("TBT Agreement"), Article 19 of the *Agreement on Agriculture* and Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT"), regarding the Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action and related measures (WT/DS26/1)". The measures in dispute were Council Directive 81/602/EEC, Council Directive 88/146/EEC, and Council Directive 88/299/EEC. These directives were replaced by Council Directive 96/22/EC on 1 July 1997.

The US Panel was convened on May 20, 1996 and the Report WT/DS26/R/USA was released on 18 August 1997.

ii) *Canada.*

As set out in para 1.1 of the Canada Panel Report, Canada requested consultations with the European Communities relying upon the same provision as the US, however their request was initiated on 28 June 1996, and was concerned with the Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action and related measures which "... adversely affect the importation of livestock and meat from livestock (WT/DS48/1)".

The Canada Panel was convened on October 16, 1996 and the Report WT/DS48/R/CAN was released on 18 August 1997. It is virtually identical to the US Panel Report, save some differences in arguments put by Canada.

"less than one percent of the US\$165 billion trade volume between the United States and the EC". psychologically it was regarded as much larger. If an issue such as the hormone ban could not be sorted out, what hope was there for negotiations considering the considerably more complex and diverse issues pertaining to the agricultural sector as a whole? See M.B. FROMAN (1989) *supra* note 7.

iii) *Third Parties.*

Pursuant to Article 4.11 of the DSU, Australia and New Zealand and Canada requested to join in the consultations between the United States and the European Communities ⁽⁵¹⁾. Only Australia and New Zealand joined in the consultations between Canada and the European Communities. The United States also requested to join these consultations, but the European Communities denied their request ⁽⁵²⁾.

In the panel in which they were not a primary participant, Australia, Canada, New Zealand, Norway and the United States reserved their right to participate in the Panel proceedings as third parties ⁽⁵³⁾.

The Hormone Panel Reports were appealed by the European Communities, with the United States and Canada making a cross-appeal. The Appellate Body Report WT/DS26/AB/R and WT/DS48/AB/R encompassing all claims was released on 16 January 1998.

PART II

THE SPS AGREEMENT AND THE HORMONE RULINGS

3. *The Applicable Law.*

The first question for the WTO Panel to decide was which of the WTO Agreements was the applicable law, and in what order should they be applied. The parties were in agreement that the measures were sanitary measures in the sense of Paragraph 1(b) of Annex A of the *SPS Agreement* ⁽⁵⁴⁾, and that the *SPS Agreement* was *prima facie* applicable ⁽⁵⁵⁾, however were in dispute as to whether the measures

(51) See Para 1.2 US Panel Report.

(52) See Para 1.2 Canada Panel Report.

(53) See Para 1.6 US Panel Report; Canada Panel Report.

(54) Para 8.21 US Panel Report; para 8.24 Canada Panel Report.

(55) Para 8.23 US Panel Report; para 8.26 Canada Panel Report.

should firstly be considered as against the *SPS Agreement* or the GATT 1994 to determine their legitimacy.

The United States, Canada, Australia and New Zealand considered that the measures were inconsistent with the *SPS Agreement*, the GATT, and the *TBT Agreement* and that they should be tested firstly against the *SPS Agreement* ⁽⁵⁶⁾. The European Communities argued that the *SPS* and *TBT Agreements* could only be considered if the measures were found to be inconsistent with the GATT and submitted that no such violation could be established.

Finding that only the *SPS Agreement* and the GATT were applicable to the dispute in issue ⁽⁵⁷⁾, the WTO Panel rejected the European Communities submission that "[t]he substantive role of the *SPS Agreement*, was to interpret Article XX(b) of GATT" ⁽⁵⁸⁾ and that the *SPS Agreement* required a prior violation of a GATT provision to be established before it could apply. It did not accept that the *SPS Agreement* imposed no "substantive" obligations other than those presently contained in Article XX(b) of GATT, nor did it accept the submitted distinction made between "substantive" and "procedural" provisions of the *SPS Agreement* which would have allowed only parts of the *SPS Agreement* to be considered in isolation of the GATT. Rather, the Panel found that the *SPS Agreement created obligations of a substantive and procedural nature which went beyond that of Article XX* ⁽⁵⁹⁾.

Accordingly the Panel felt at liberty to determine the order in which the two Agreements should be considered, and determined that they could be considered in isolation. It applied the *SPS Agreement* first as the most efficient means of proceeding ⁽⁶⁰⁾. This finding was not appealed.

The temporal application of the *SPS Agreement* to the measures in dispute was appealed by the European Communities, however the Appellate Body supported the Panel's finding that the *SPS Agree-*

(56) Norway supported the European Communities position that the Hormone ban was not in contravention of the *SPS Agreement*.

(57) Paras 8.24-8.30 US Panel Report; paras 8.31-33 Canada Panel Report.

(58) Para 4.4 US Panel Report; paras 4.3 Canada Panel Report.

(59) Para 8.36 US Panel Report; paras 8.36-41 Canada Panel Report.

(60) Para 8.42 US Panel Report.

ment applied to measures enacted before 1 January 1995 still in existence at the time of the dispute. Furthermore it pointed out that since 1 July 1997, the measure under dispute was to be found in Directive 96/22 and not in pre-1995 directives. The applicability of the *SPS Agreement* to Directive 96/22 was not contested by the parties.

3.1. *Choosing the correct Agreement: the SPS Agreement, Article XX and implications for environmental protection.*

As evident from the USTR "Statement of Administrative Action" submitted by the European Communities:

The S&P negotiations initially began as an attempt to elaborate on the provisions of Article XX(b). The Agreement extends beyond an interpretation of existing GATT provisions, however, and includes new obligations — in particular, transparency requirements such as providing notice of, and an opportunity to comment on, proposed S&P measures ⁽⁶¹⁾.

The environmental community was strongly critical of the negotiation of the *SPS Agreement*, as it saw it as substantially limiting the already constrained circumstances in which environmentally based trade measures could be used ⁽⁶²⁾.

The *SPS Agreement* is designed to apply to only certain measures: those taken for sanitary and phytosanitary purposes in order to protect the Member's own environment. The ability to apply measures extraterritorially appears limited, as is the categories of products to which the measures can be applied. For example, the definition of a sanitary or phytosanitary measure appearing in paragraphs 1(a)-(d) of Annex A is limited to measures applied to protect,

(61) US Statement of Administrative Action, p. 87. at para 4.4 US Panel Report.

(62) See e.g. J. McDONALD (1997). *The WTO's response to the trade-environment debate: a preliminary report card*. 23rd International Trade Law Conference, 29 May, Australian National University. See Esty for a discussion of the consistently narrow interpretation GATT panels have taken towards interpreting the GATT regarding the legitimacy of environmentally based trade measures. D. ESTY (1994). *Greening the GATT: Trade, Environment and the Future*. Washington, Institute for International Economics.

prevent or limit damage to human, animal or plant life or health *within the territory* of the Member. The categories of objects or entities to which the measures may be applied are pests, diseases, disease-carrying or disease-causing organisms brought in by animals, plants or products thereof; foods, beverages or feedstuffs which pose risks flowing from contaminants, toxins or disease-causing organisms.

One of the key features which environmentalists participating in the trade and environment 'debate' wish to preserve, and indeed develop, is the ability for nations to take measures extraterritorially so as to protect the environment not just within national borders, but within shared regions and, in some cases, within the territory of others. One approach which is advocated is to identify the processes and production methods used in internationally traded goods which cause harmful environmental externalities — whether they are visible or not in the final product — and then slow or halt the trade in those goods either through taxes or bans. This was the basis of the environmentally based measures considered in the 1991 and 1994 cases entitled *US - Restrictions on Imports of Tuna* ⁽⁶³⁾; and in the 1998 case *United States - Import Prohibition of Certain Shrimp and Shrimp Products*.

Whereas Panels have traditionally been reluctant to distinguish between products on the basis of how they have been processed and produced unless the effects are obviously visible in the final product, at least in so far as Article III of the GATT is concerned ⁽⁶⁴⁾, sanitary and phytosanitary measures do include "relevant laws, decrees,

(63) GATT Doc. DS 21/R Sept. 3 1991 (unadopted) and GATT Doc. DS 29/R June 1994 (unadopted) respectively. These cases are known as the Tuna-Dolphin cases.

(64) See the Tuna-Dolphin cases and *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996; and WYNTER (1997) *Can the World Trade Organization do the Environment Justice? International Conference on Environmental Justice: Global Ethics for the 21st Century*, University of Melbourne, Australia, 1-3rd October. At the time of writing the Panel Report on *United States - Import Prohibition of Certain Shrimp and Shrimp Products* had not been released. This Report is expected to advance the thinking on how measures aimed at environmentally harmful process and product are compatible with Article XX of the GATT 1994.

regulations, requirements and procedures including ... processes and production methods" (65). Distinguishing between products on the basis of how they are processed and produced is acceptable under the *SPS Agreement*.

This was made clear by the Appellate Body in the Hormone dispute (66). Here, the Appellate Body accepted a difference in levels of protection for hormones used for growth promotion purposes and for therapeutic and zootechnical purposes because of the differing conditions under which the hormones were administered — that is the manner in which the meat and meat products in question had been processed and produced. For example, hormones used for growth promotion purposes are generally administered as implants to the whole herd and are used continuously for a long period of time. They may or may not be administered by a veterinarian. In contrast, hormones used for therapeutic purposes are administered only on a small scale and are generally used on cattle not intended for slaughter. Hormones used for zootechnical purposes may be administered to the whole herd, but only once per year. In both cases the hormones must be administered by a veterinarian who must comply with strict administration and reporting conditions set out by European Communities legislation. Implants are not used. In view of these differences, the Appellate Body found it reasonable that the European Communities apply a higher level of protection to hormones administered for growth promotion purposes than to hormones administered for therapeutic and zootechnical purposes. It made this finding despite the fact that there was no easily observable difference in meat treated for growth promotion and therapeutic or zootechnical purposes and that distinguishing between meat to which hormones have and have not been added can be quite difficult.

It is clear from this ruling that the measures can be applied extraterritorially in the sense that process and production methods which occur extraterritorially will be taken into account. The subject

(65) Annex A, para I of the *SPS Agreement*.

(66) See part XII of the Appellate Body Report, particularly at paras 223-225.

to be protected from the risk flowing from the processing and production methods is however the consumer who is residing within the territory of the Member. There is a direct connection between the conditions in which the hormones are administered and the possible impacts on the human health within the territory of a Member.

It is unclear to what extent the *SPS Agreement* would cover a hypothetical situation where, for example, agricultural chemicals are used to grow an edible crop and whilst the chemicals do not appear harmful to humans, they are particularly harmful to an endangered species of bird which feeds in that area and outside the territorial jurisdiction of the Member importing the crop. Could that Member ban the importation of that crop unless the chemical usage is changed to protect the bird, as they do not wish to participate in practices which already threaten a depleted species? Would the situation be different if the species of bird migrated between the Member imposing the ban and the Member using the chemicals? In the former case the Member applying the ban would have to argue that it had sufficient connection with the bird for it to be considered part of *their* territory as it is part of the common heritage of mankind. In the latter situation it would argue that as the bird resides in their territory at least part of the time, it is appropriate to protect it as if it were an expanded part of their territory. Would it make a difference to the outcome, the fact that either both or at least one Member were parties to the *Bonn Convention on the Conservation of Migratory Species of Wild Animals*, the *Convention on the International Trade in Endangered Species of Wild Fauna and Flora*, the *Convention on Biological Diversity*, or the *International Convention for the Protection of Birds*? Could any of these agreements be considered to set international standards for the protection of the hypothetical species of bird, or define the international law relevant to the protection of the bird? These issues are probably better handled by Article XX of the GATT and not the *SPS agreement*.

What about if a Member wanted to ban the importation of a product which is produced which is made from plant products, to which toxins have been added, but is not a food, beverage or feedstuff. Is it covered by the *SPS Agreement*? If the product is not

a food, beverage or feedstuff, but carries the risk of disease or pests, then it is covered (para 1(c) of Annex A). If it is food, beverage or feedstuff, and the risk results from additives, contaminants, toxins or disease-causing organisms, it is also covered (para 1(b)). Products which are not a food, beverage or feedstuff but which contain or have been made with toxins dangerous to human health do not appear to be covered, unless the separate elements of para 1 can be said to inform one another. A product which fell into this category would probably be able to be excluded under the GATT because a product which is toxic is clearly not 'like' a product which is toxic and, unlike the *SPS Agreement*, Article XX(b) does not limited its coverage to only certain categories of products.

Whether the fact that the *SPS Agreement* and the GATT, in particular Article XX operate independently strengthens an *a contrario* argument that Article XX(b) will allow Members to apply measures to protect not just their own environment but the global commons' is also unclear. Although it remains unadopted, a GATT panel indicates that the extrajurisdictional application of trade measures do not fall within the general exceptions allowed by Article XX⁽⁶⁷⁾, and two GATT panels indicate that restricting the trade of products on the basis of non-product related production characteristics does not, at least in the absence of international consensus, fall within the Article XX general exceptions⁽⁶⁸⁾.

4. *The Burden of Proof.*

To bring an action against a Member pursuant to the *SPS Agreement*, a complainant needs to show a *prima facie* case that the

(67) *US - Restrictions on Imports of Tuna* GATT Doc. DS 21/R Sept. 3 1991 (unadopted). Cf. *US - Restrictions on Imports of Tuna* GATT Doc. DS 29/R June 1994 (unadopted) which disagrees with the former Panel's decision on this point.

(68) *US - Restrictions on Imports of Tuna* GATT Doc DS 21/R Sept. 3 1991 (unadopted) and GATT Doc DS 29/R June 94 (unadopted). See Housman et al for a discussion of the compatibility of trade measures applied extrajurisdictionally pursuant to Multilateral Environmental Agreements, R. HOUSMAN, D. GOLDBERG, et al., Eds. (1995). *The Use of Trade Measures in Select Multilateral Environmental Agreements*. Trade and Environment Series, United Nations Environment Programme.

Member has first, chosen SPS standards which are higher than the relevant international standards, and second, they have been put in place without a risk assessment having been done with respect to the threat which the standards intend to protect against.

Once a complainant has shown that the Member's standards are higher than the relevant international standards, guidelines or recommendations, and that no adequate risk assessment has been done; or that the standards have been applied in some other manner which is inconsistent with the *SPS Agreement*, the burden shifts to the Member to prove that nevertheless the standards do comply with the *SPS Agreement*. This distribution of the burden of proof is consistent with the manner in which proof is treated in other WTO Agreements. See in particular *United States — Measure Affecting Imports of Woven Wool Shirts and Blouses From India* (*United States — Shirts and Blouses*) and also *United States — Restrictions on Imports of Cotton and Man-Made Fibre Underwear*.

The European Communities argued at first instance that the burden of proof rested solely on the complainants (the United States and Canada) to show that the growth-hormones in dispute were risk free. This was rejected by the Panel in their Reports. Although the Panel tried to take particular care in identifying the burden of proof required by each Article of the *SPS Agreement*, including the level of proof required and the party upon whom the burden of proof lay, their efforts were severely criticised by the Appellate Body. Indeed the Appellate Body charged the Panel with paying "little more than lip-service" to the ruling in *United States — Shirts and Blouses*.

The Panel had sought to make a general interpretative ruling which placed an evidentiary burden on the defendant unless that Member's standards were based on or conformed to international standards. It based this ruling on a reading of Articles 2.2, 2.3, 5.1 and 5.6 of the *SPS Agreement*, 5.8, 3.1, 3.2, and 3.3 as well as "established practice under the GATT 1947 and 1994" in relation to Article XX. It characterised the right of a Member to choose its appropriate level of protection not based on international standards as an "exception" to the general rule that Members must base their

SPS measures on international standards ⁽⁶⁹⁾. The effect of this, the Appellate Body pointed out, would be to penalise the defendant for exercising this right of choice by requiring them to justify their choice before the complainant had brought a *prima facie* case to show that the defendant acted contrary to the *SPS Agreement*.

In this context the Appellate Body said at para 104:

The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of showing consistency with that provision is taken on by the defending party, is *not* avoided by simply describing that same provision as an “exception”. In much the same way, merely characterising a treaty provision as an “exception” does not by itself justify a “stricter” or “narrower” interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty’s object and purpose, or in other words, by applying the normal rules of treaty interpretation.

The Appellate Body’s discussion on this point, including its extensive criticisms of the Panel’s approach, serves as a timely reminder that both the structure and words of the Agreement must be carefully observed so as to preserve the rights of the parties and essence of the Agreement as a whole. The negotiators of the *SPS Agreement* attempted to balance the democratic right of nations to choose their own level of protection against a means of ensuring that the chosen protection reflects genuine health and environmental concerns and not protectionist concerns. Observing the words of the Agreement allows predictability in ensuring that this objective is fulfilled.

Waincymer suggests that modifying and expanding the words appearing in the chapeau of Article XX of the GATT into the *SPS Agreement*, particularly at Article 2.3, makes the chapeau obligations “a positive obligation under Article 2.3 of the *SPS Agreement*. The irony from a legal perspective is that changing it from an

(69) See at para 104 Appellate Body Report.

exception to an obligation will change the burden of proof and in that sense make it harder for a complainant to succeed" (70).

Article 5.5, which received substantial consideration in the Hormone Reports, also partly reflects the words of the chapeau, and as clarified by the Appellate Body, if a complainant does wish to rely on this ground, they bear the burden of proof. To succeed under Article 5.5, the complainant must show *prima facie* that differences in levels of protection afforded by existing standards in different but comparable situations resulted in discrimination or a disguised restriction in international trade. The Appellate Body corrected the Panel's treatment of the burden of proof in this regard (71).

It must be emphasised that for a complainant to succeed under the *SPS Agreement* however, it does not have to demonstrate a measure's inconsistency with Articles 2.3 or 5.5 although that might strengthen the case against the measure. Nor, as made clear by the result flowing from the Appellate Body's Report in the Hormone dispute, does evidence by the defendant that measures are *not* inconsistent with Article 2.3 or 5.5 necessarily save the measures from an otherwise inconsistency — as it might under Article XX. Setting aside the notion that it is often easier to prove a positive rather than a negative, the effect for the complainant flowing from this distribution of the burden of proof under the *SPS Agreement* is that whilst it might be harder for the complainant to prove this ground under the *SPS Agreement*, it can afford *not* to bring evidence on this point. On the other hand, failure to bring evidence on this point under Article XX of the GATT if the defendant raises it could mean the loss of the case for the complainant.

5. *The Standard of Review.*

Setting the appropriate level of review to apply to a dispute is

(70) J. WAINCYMER (1996). *Reformulated gasoline under reformulated WTO dispute settlement procedures: pulling Pandora out of a chapeau?* *Michigan Journal of International Law* 18(Fall): 141-181 at n.40.

(71) The Panel also fell into error in finding the defendant bore the burden of proving that their measures were based on a risk assessment (Article 5.1). See paras 97-109 Appellate Body Report.

absolutely vital for maintaining the balance between allowing measures which actually protect a Member's environment and health of its citizens, without such measures impinging unfairly on trade. The Panel must apply this standard to scrutinise the scientific validity of risk assessments done by the Members and the conclusions they draw from those risk assessment.

The European Communities submitted on appeal that the Panel had not applied the appropriate standard of review to the evidence put before it by the European Communities. It argued that that two possible approaches to determining the appropriate standard of review are a *de novo* standard and 'deference' to the findings of the Member. It submitted that Article 17.6 of the *WTO Agreement on Anti-Dumping and Countervailing Duties* provided a useful model for investigations done under the *SPS Agreement* which the Panel should have applied. It described the Article 17.6 standard as a "deferential reasonableness standard" (72).

The Panel was careful not to apply a *de novo* standard of review and this move was supported by the Appellate Body. The Appellate Body found that whilst the *SPS Agreement* did not itself clarify the standard of review to be used, that Article 11 of the DSU was directly applicable, setting out that the appropriate standard was "an objective assessment of the facts" (73). It pointed out that "total deference to the findings of the national authorities ... could not ensure an objective assessment' as foreseen by Article 11 of the DSU" (74).

The Appellate Body upheld the Panel's findings with regards to the appeal by the European Communities on the basis that the Panel had not applied either a "deferential reasonableness standard" or the standard set out by Article 17.6 of the *Anti-Dumping Agreement*. Its ensuing analysis of the Panel's Report was whether the Panel had made an objective assessment of the matter before it and of the facts. The Appellate Body did find that the Panel's Report did

(72) Para 111-113 Appellate Body Report.

(73) Para 116-117 Appellate Body Report.

(74) Para 117 Appellate Body Report, quoting from Panel Report *United States - Underwear*, adopted 25 February 1997, WT/DS24/R, para 7.10.

contain on one point a misrepresentation of the facts and evidence before it, but was not "egregious disregarding or distorting of the evidence before the Panel" (75).

6. *The Importance of International Standards, Guidelines and Recommendations.*

6.1. *Basing measures on international standards.*

The device used by the *SPS Agreement* to achieve harmonisation of the SPS standards imposed by Member States, is to encourage Members to base their standards on international standards, guidelines and recommendations. Harmonisation is desirable as not only does it reduce the complexity of legislation which importers have to deal with (in itself an impediment to trade), but minimises the use of such standards for protectionist purposes. As pointed out by the Appellate Body however, harmonisation is a *goal* of the *SPS Agreement*, but is not a legal requirement of the here and now (76). The Panel was severely criticised for interpreting Article 3, and in particular Article 3.1, as vesting international standards with "*obligatory* force and effect ... transform[ing] those standards, guidelines and recommendations into binding *norms*." (77)

The United States and Canada were able to trigger the application of the *SPS Agreement* to the European Hormone Ban by showing, *prima facie*, that the standards applied by the European Communities with respect to the natural hormones *oestradiol-17 β* , *progesterone* and *testosterone*, and the synthetic hormones *zeranol* and *trenbolone*, were higher than the international standards set by the Codex Alimentarius for those substances. They also provided sufficient evidence to show that whilst risk assessments had been done by the European Communities, international bodies and independent academics, the European Communities standards were not

(75) See Part VIII of the Appellate Body Report, in particular para 144.

(76) Para 165 Appellate Body Report.

(77) At para 165 Appellate Body Report.

based on *those* risk assessments but on the possibility of risk which, in the opinion of the Appellate Body, had not been fully assessed.

Article 3 of the *SPS Agreement* states:

3.1 To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary and phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.

3.2 Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.

3.3 Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. ⁽⁷⁸⁾ Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.

National SPS standards may either be *based on* international standards (Article 3.1); *conform to* international standards (Article 3.2) or be *higher than* international standards if there is scientific justifications or a Member determines it to be appropriate (Article 3.3).

Where the chosen standard conforms to, that is the same as, the international standard, it is rebuttably presumed to be consistent with the *SPS Agreement* and the GATT 1994. As emphasised by the

(78) For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

Appellate Body, members have an autonomous right to choose a level of protection which is higher than that afforded by international standards and may either base their chosen level of protection on the international standards or disregard the international standards ⁽⁷⁹⁾. This right is qualified in both situations by the *SPS Agreement* requiring that Members justify their ban by basing their standards on a risk assessment according to Article 5.1. This is a balancing mechanism intended to ensure health and environmental standards can be used, but not abused.

The European Communities unsuccessfully argued that the international standards established by the Codex did not apply to this dispute. It argued that whereas the European Communities standards affect the *use* of the hormones, the Codex does not set standards for the use of hormones but rather *maximum residue limits*. The Panel disposed of this argument by stating that the standards set by both the European Communities and the Codex reflect a *level of protection*, of which the European Communities' level is considerably higher. It further concluded that a level of protection could be "directly linked to the *amount of residues* of that drug allowed either to be ingested by humans on a daily basis or to be present in a particular food" ⁽⁸⁰⁾ and thus could be expressed as an 'acceptable daily intake' (ADI level) of the substance and/or a 'maximum residue limit' (MRL level) permissible in the food ⁽⁸¹⁾.

The Panel excluded from examination "(i) whether the standards reflect *levels* of protection or sanitary *measures* or the *type* of sanitary measure they recommend, or (ii) whether these standards have been adopted by consensus or by a wide or narrow majority, or (iii) whether the period during which they have been discussed or the date of their adoption was before or after the entry into force of

(79) Para 104 and 172 Appellate Body Report.

(80) Para 8.74 US Panel Report; para 8.76 Canada Panel Report.

(81) The Panel stated "[T]he fact that an ADI or MRL can *reflect* a *level* of protection (without *stricto sensu* itself *being* a level of protection), does not exclude, as the European Communities has argued, that an ADI or MRL can also be a sanitary *measure* in the sense of the *SPS Agreement*". Para 8.74 US Panel Report; para 8.76 Canada Panel Report.

the *SPS Agreement*" (82). The Appellate Body agreed that the Codex standards were apposite to the dispute.

Looking only to the level of protection reflected by a standard and not at the manner of construction of the standard is a narrow approach, but avoids the potential for a *de novo* investigation to be made. Furthermore, it means that all standards, guidelines and recommendations appear to have the same weight, regardless of whether they were formed by consensual opinion, a large majority, or a small majority — as in fact was the case of the Codex standards for the hormones the subject of this dispute (83).

At the same time it allows a much more flexible application of international standards and minimises the potential for Members to devise standards technically different from the international standard to avoid having to be in harmony with it. The European Communities' argument that the Codex standards raised in the dispute were in fact not relevant to the European Communities measures was reminiscent of arguments used to prevent the hormone dispute from being considered under the Tokyo Round *TBT Agreement* (84).

In March 1987, the United States attempted to use GATT procedures to have the dispute resolved. Raising the hormone ban under the Tokyo Round *TBT Agreement* it unsuccessfully engaged in

(82) At para 8.69 US Panel Report; para 8.72 Canada Panel Report.

(83) When the Codex originally considered whether to approve the use of hormones in 1991, it was unable to reach a consensus on the matter. "28 of 37 participating countries objected to adoption of the standards and forced a vote on the issue. Only 12 countries voted to adopt the standards, and the matter was postponed". Sierra Club Legal Defence Fund (1996). *World Trade Organization Dispute Settlement Proceeding European Communities - Measures Concerning Meat and Meat Products (Hormones)* located at Public Citizen Website: <http://www.citizen.org/gtw/whatsnew/beef3.html> p. 9. In 1995 when it reconsidered the issue, it approved the hormone use only by a small majority (33 countries for, 29 against and 7 abstentions).

(84) The European Communities submitted that "the Codex standards outlined above are not relevant to this dispute [and that as] ... there are no Codex standards for the use of hormone growth promoters, only Codex standards for *maximum residue levels* and that since the EC measures in dispute do not set maximum residue levels, there exist no Codex standards on which the EC measures need to be based". Para 8.66 US Panel Report; para 8.69 Canada Panel Report.

extensive negotiations and consultations with Europe to have the hormone ban removed and subsequently requested a technical experts group to be formed under Article 14.5 of the *TBT Agreement* ⁽⁸⁵⁾.

The European Communities were able to prevent the investigation by claiming that the hormone directives applied to process and production (PPM) standards, and argued that the *TBT Agreement* provided jurisdiction to rule on product standards but not on standards aimed at how products had been processed and produced ⁽⁸⁶⁾. They argued that an explanatory note to Annex I, (which they had insisted upon being included during the Tokyo Round negotiations) excluded "codes of practice" from being investigated under the Agreement. The codes of practice were generally understood to refer to PPMs ⁽⁸⁷⁾.

The European Communities maintained "that parties to the *TBT Agreement* only had an obligation not to use PPMs to circumvent the Agreement" ⁽⁸⁸⁾ and invited the United States to join them in "evaluat[ing] the rights and obligations of Parties deriving from Article 14.25 (of the *TBT Agreement*)" ⁽⁸⁹⁾, that is to look at

(85) US Panel Report, para 2.34. At the time, Dr. Houston, Administrator of the Food Safety Inspection Service, United States Department of Agriculture, claimed an EU-type hormone ban in the United States would be "legally impossible" as United States law "requires approval of animal drugs shown to be safe and effective". Quoted from "Hormone ban is technical trade barrier, US says in complaint". *Food Chemical News* 28, No. 50 (16 February, 1987) in USDA (1987) *supra* note 8 at p. 20.

(86) D. VOGEL (1995) *supra* note 9. The European Communities were unwilling to engage in a purely scientific examination of the hormone ban. Rather it wished factors such as consumer fears about hormone use to be taken into account when evaluating the ban. Whilst the United States believed that it would be successful in the scientific aspects of the dispute resolution under the *TBT Agreement*, it was unsure of a positive result if the dispute had gone to a committee deciding on the *legal* aspects of the ban given its facially non-discriminatory character. This created a stalemate between the parties and adjudication was not forthcoming.

(87) D. VOGEL (1995) *supra* note 9 at p. 165.

(88) US Panel Report, para 2.34. See Art 14 Para 25 of the Tokyo TBT Agreement.

(89) US Panel Report, para 2.34, quoting GATT document TBT/M/Spec/7, p. 9.

the legal applicability of the *TBT Agreement* to production standards. Although the United States considered that the European Communities' legislation could have been equally expressed as a product standard and therefore escaped examination on technical grounds only, it did not agree to have the issue examined before a panel ⁽⁹⁰⁾.

The Appellate Body considered the Panel fell into error by finding that to be *based on* the international standard, the measure must reflect the *same* level of protection as the international standard ⁽⁹¹⁾. The Panel's finding essentially equated the concept of being 'based on' with 'conformity to', thereby blurring the meaning of Articles 3.1, 3.2 and 3.3. As pointed out by the Appellate Body, the difference in language between Articles 3.1, 3.3 and 2.2 which uses the words 'based on' or 'base', and Articles 3.2 which uses the word 'conform', cannot be considered to be merely accidental but must be given their ordinary meaning. This is in accordance with the proper practice of treaty interpretation. As the Appellate Body pointed out, to be 'based on' implies to be "founded" or "built" upon, whereas to 'conform to' implies "compliance with" or "correspondence in form or manner" ⁽⁹²⁾. The meanings are quite distinct and must be reflected in findings pursuant to this Article.

The Panel compounded its error in relation to the interpretation of Article 3.3 by characterising this provision as an exception rather than as a right of Members to choose their own standards, irrespective of international standards, guidelines or recommendations as emphasised in the preamble to the *SPS Agreement*. Although the Appellate Body held that the Panel's analysis of Article 3.3 was essentially flawed by its misinterpretation of the concept of 'based on' within the context of the whole of Article 3 referred to above, it did agree with the Panel that for a measure to be consistent with Article 3.3, it must be based on a risk assessment as specified in Article 5.1. In this respect Article 3.3 is similar to Article 3.1, both Articles emphasising that certain checks and balances must be

(90) See Vogel (1995) for further details, *supra* note 9.

(91) Para 8.73 US Panel Report; para 8.75 Canada Panel Report.

(92) See further at para 163 Appellate Body Report.

observed if Members do wish to implement individualised SPS standards which might have an effect on international trade.

6.2. *The reification of international standards, guidelines and recommendations.*

The Panel was severely criticised for interpreting Article 3, and in particular Article 3.1, as vesting international standards with “*obligatory force and effect ... transform[ing] those standards, guidelines and recommendations into binding norms*”⁽⁹³⁾. As the Appellate Body took pains to point out, Members do not have to unthinkingly implement relevant international standards to be in compliance with the *SPS Agreement*, but may choose national standards adapted to their own national conditions — including the anxieties of their consumers. Nevertheless, the congruence between a Member’s standards and international standards acts as a trigger for whether an action taken under the *SPS Agreement* can be brought.

This adds considerably to the weight of international standards, guidelines and recommendations such as those provided by the Codex. They have always been recommendations, but now have gone beyond the point of being merely hortatory and only *potentially* evidence of customary practice⁽⁹⁴⁾, to be standards which Members ignore at their peril.

Time will be the judge of what effect will this have on the making of future international standards, and whether the effect works to achieve the upwards or downward harmonisation of international environmental, consumer health and safety standards. As discussed in Braithwaite and Drahos, vagueness as to the binding character of international regulatory regimes can assist in the improvement of, for example, environmental regimes⁽⁹⁵⁾.

(93) At para 165 Appellate Body Report.

(94) See Higgins for a critique on the current fashion of considering merely the resolutions of international organisations to determine evidence of international customary law, without consideration of the deliberations and other activities of the organisation in conjunction with making the decision. Higgins, R. (1994). *Problems and Process: International Law and How We Use It*. Oxford, Clarendon.

(95) J. BRAITHWAITE and P. DRAHOS (1996). *The Environment. Global Business Regulation*. Unpublished manuscript on file with author.

Rather than 'symbolic' regulatory regimes being of little use, as is generally considered to be the case, such regimes allow states to move towards higher environmental standards as their social, political and economic circumstances allow ⁽⁹⁶⁾. This is of course unlikely to happen until the particular state in question realises that they will benefit from taking such a step, but "concern, norms and capacity build faster when they are not induced by threat" ⁽⁹⁷⁾.

However it is also possible that treating international standards, guidelines and recommendations as defining the ceiling above which scientific justification is necessary to increase the level of protection may further politicise and have a 'chilling' effect on the standard setting behaviour of international organisations. It should be noted that although the Panel found that it did not need to consider "whether [the] standards [had] been adopted by consensus or by a wide or narrow majority" ⁽⁹⁸⁾, in this dispute it did not exclude such an examination as irrelevant and never to be taken into account. If standardising bodies were aware that the *process* of their deliberations were to be taken into account, they might be less hesitant in agreeing to a standard, guideline or recommendation ⁽⁹⁹⁾. In this

(96) M.A. LEVY, R.O. KEOHANE, & P.M. HAAS (1992) *Institutions for the Earth: promoting international environmental protection*, *Environment* 34, in J. BRAITHWAITE, and P. DRAHOS (1996) *supra* note 93.

(97) J. BRAITHWAITE and P. DRAHOS (1996) *supra* note 93 at p. 63, quoting S. BREHM, & J. BREHM (1981) *Psychological Reluctance: A Theory of Freedom and Control*. New York: Academic Press.

(98) Para 8.69 US Panel Report.

(99) Looking only at the standard without considering the process of reaching the standard has parallels with focusing on resolutions as evidence of state practice. See Higgins who writes "Resolutions are but one manifestation of state practice. But in recent years there has been an obsessive interest with *resolutions* as an isolated phenomenon. Intellectually, this is hard to understand or justify. We can only suppose that it is easier — that is, that it requires less effort, less rigour, less by way of meticulous analysis — to comment on the legal effect of a resolution than to look at a collective practice on a certain issue in all its complex manifestations. The political bodies of international organizations engage in debate; in the public exchange of views and positions taken; in expressing reservations upon views being taken by others; in preparing drafts intended for treaties, or declarations, or binding resolutions, or codes; and in decision-making that may or may not imply a legal view upon a particular issue. Some of these activities may result in resolutions of one sort or another. But the current fashion is often to examine the resolution to the

author's view, the margin by which the vote to adopt an international standard succeeded should be considered when assessing a defendant's arguments justifying a higher SPS standards than the international standard, i.e. under Article 3.3; particularly if a substantial proportion of the minority argued for higher standards than those actually set. It is hardly fair that a Member should find impediments blocking its adoption of a high SPS standard when the international community itself is in doubt as to whether the international standard is set at the right level ⁽¹⁰⁰⁾. This is particularly so as the *SPS Agreement* cannot itself encourage a move to higher standards ⁽¹⁰¹⁾.

7. *The Assessment of Risk and Determination of the Appropriate Level of Sanitary of Phytosanitary Protection.*

Article 5.1 states:

Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

As stated above, a risk assessment is the necessary foundation for all national SPS standards, unless the standards conform to international standards (Article 3.2). The risk assessment may be

exclusion of all else. We are examining only part of the picture". R. HIGGINS (1994) *supra* note 92 at p. 23-24.

(100) It is also worth considering, when weighing the importance to be placed on the Codex's determination, that it is countries which ultimately make up the Codex. Whilst they do act in the interests of sound science, they can also act in a manner which furthers their own economic interests — in this case easier access to a large market. This was adduced by the European Communities' Commissioner for Agriculture, Franz Fischler, when expressing disappointment that the Codex had set MRLs for growth hormones. *Agra Europe* (1995). Consumer groups attacks Codex decision on hormones. *Agra Europe*. London: E/4.

(101) See Wirth's characterisation of *SPS Agreement* obligations as 'negative' obligations because the Agreement does not "contain affirmative requirements directing national governments to achieve certain minimum criteria in these areas." D.A. WIRTH (1994) *supra* note 46 at p. 818.

performed by the Member or by other Members, or by an international organisation. Such an assessment helps legitimise a Member's choice of their appropriate level of protection.

Risk assessment involves both a scientific determination of the uncertainty of an event and ensuing damage occurring, and a psychological evaluation of the attitudes people have towards that event. The process of risk assessment is inherently a subjective one and involves interconnecting issues including the concern which individuals, groups or cultures have towards an event; social issues of fairness and ethics such as whether the risk is voluntary, involuntary or unknown; and political and economic considerations such as whether the benefits outweigh the risk and whether it is cheaper to live with the risk than remove it ⁽¹⁰²⁾.

Wirth notes that a bifurcation of the risk assessment process which isolates first the scientific aspects of the risk and then evaluates the subjective elements of the risk is a commonly used but not a universally accepted approach ⁽¹⁰³⁾. The WTO Panel went beyond such a bifurcation, appearing to remove the subjective determination of risk from the risk assessment process altogether. It stated "an assessment of risks is, at least for risks to human life or health, a *scientific* examination of data and factual studies; it is not a policy exercise involving social value judgments made by political bodies" ⁽¹⁰⁴⁾. The WTO Panel did consider the subjective elements integral to assessing risk as part of a process of determining the 'risk management', however it found that the determinations made during this phase could not override the scientific conclusions drawn

(102) I. BURTON, R.W. KATES et al. (1978). *The Environment as Hazard*. New York, Oxford University Press; J. HANDMER, B. DUTTON et al., Eds. (1991). *New Perspectives on Uncertainty and Risk*. Canberra, Centre for Resource and Environmental Studies, Australian National University, and Australian Disaster College, Natural Disasters Organization, Mt. Macedon, Victoria; Brown, A. J. (1992). "Prayers of sense and reason: mining, environmental risk assessment and the politics of objectivity". *Environmental and Planning Law Journal* 4: 387-410.

(103) This is particularly so as "the allegedly scientific process of risk assessment necessarily requires inferences, choices, and assumptions that themselves reflect policy preferences, an area sometimes known as 'science policy.'" D.A. WIRTH (1994) *supra* note 46 at 833, 834 and n. 63-65.

(104) Para 8.94 US Panel Report; para 9.97 Canada Panel Report.

during the risk assessment phases. It explained that to do so would allow the object and purpose of the *SPS Agreement* — the harmonisation of standards — to be undermined ⁽¹⁰⁵⁾.

The Appellate Body was strongly critical of the Panel's interpretation of Article 5.1, in particular the Panel's separation of the investigation into risk assessment and risk management. It found that the term risk management' had no basis in the text of either Article 5 or the *SPS Agreement* as a whole, and that such a separation led to an unduly restrictive approach to risk assessment ⁽¹⁰⁶⁾.

The WTO Panel noted that the hormone dispute required it to deal with complex scientific facts regarding the potential effects of growth-promoting hormones on human and animal life and health. The Panel appeared to take two important measures to distance itself from making any *de novo* scientific determinations in addition to its refusal to examine the construction of international standards, discussed earlier. First, the Panel heard extensive evidence from six scientific and technical experts advising on these effects, in written form and during a two day meeting conducted jointly with the United States and Canadian panels. This allowed the Panel to gain a more scientific appreciation of the effects of the hormones under dispute and the evidence presented by the parties and added credibility to their and the Appellate Body's judgment ⁽¹⁰⁷⁾. Second, the Panel held that it was for the defendants to establish whether its measures were based on a risk assessment, this was not a role which the Panel could undertake ⁽¹⁰⁸⁾.

The Panel was required by the terms of the *SPS Agreement* to consult scientific experts. However the device of including this as a condition of the Agreement, and the Panel's treatment of the science

(105) See para 8.161 US Panel Report; para 8.164 Canada Panel Report.

(106) Para 181 Appellate Body Report.

(107) The US, Canada and the European Communities were able to nominate one candidate each, the Panel chose two experts from a list provided by the Codex Commission secretariat and the International Agency for Research on Cancer (to which the parties could make objections) and the Codex Commission secretariat also assisted the Panel. See Part VI of the US Panel Report.

(108) At para 8.101 US and Canada Panel Reports.

presented by the Parties and the experts, tends to indicate a recognition by both the WTO negotiators and Panel of the criticisms made, particularly in the wake of the infamous *Tuna-Dolphin* cases decided under the GATT regime, that Panels do not have the technical competence to decide issues of complex scientific fact and to embark on such an endeavour merely reduced the community's confidence in the decision-making process as a whole ⁽¹⁰⁹⁾. Additionally, it provides instructive insight into the process of balancing the advice of neutral experts with the scientific determinations of national authorities, and the willingness of the WTO to add its own factual determinations to this process ⁽¹¹⁰⁾.

(109) See J. McDONALD (1997) *supra* note 62. These concerns remain, to some extent, relevant to this dispute as whilst experts were consulted, this was on an individual basis. It was the Panel which was forced to weigh and reconcile the disputed scientific evidence, possibly without some of the scientific and methodological rigour which a panel of scientific experts, working together to provide a cohesive report, would have been able to contribute. Perhaps it was felt that it would be too difficult to reach a consensus amongst the experts, or that such an exercise would unduly focus on the scientific elements of the risk assessment, excluding the subjective considerations which the European Communities was in the best position to assess. The European Communities appealed from the Panel's decision to not constitute a group of experts, however the Appellate Body upheld the Panel's decision as being supported by Article 11.2 of the *SPS Agreement* and Article 13 of the DSU. In particular whilst Article 11.2 states that a Panel *should* seek advice from experts where scientific and technical issues are involved, a Panel need only establish an advisory *group* of experts when it deems it appropriate.

(110) For a very thorough treatment of policy questions pertaining to the WTO's balancing of the advice of neutral experts with the scientific determinations of national authorities against the WTO Panels' factual determinations, see D.A. WIRTH (1994) *supra* note 46. The paper may be updated by taking into account the Panel and Appellate Body deliberations in *World Trade Organization: Report of the Appellate Body and Panel in United States - Standards for Reformulated and Conventional Gasoline* (1996) 35 ILM 603, noting that neither body chose to consult experts when determining the complex scientific facts surrounding the setting of standards for the Gasoline at issue. See also *Australia - Measures affecting the importation of salmon*. This report has not been released at the time of writing. It is well to note the power experts can exercise within the judicial forum. *New Scientist* reports that in a study of 58 judicial cases where a scientific expert was appointed, 56 of the decisions conformed to the testimony of the expert "suggesting that courts may slavishly follow the opinion of a single independent expert". It noted that in adversarial proceedings scientists are "frequently chosen because of their views are on the extreme ends of an issue. As a result, the judge and jury never get to hear what the consensus is". K. KLEINER (1998) *Experts' experts*

The Hormone Panels accepted the scientific reports of the European Communities as evidence of risk assessments done in accordance with Article 5 for all of the hormones in dispute except MGA ⁽¹¹¹⁾ but found that the European Communities had met neither the minimum procedural requirements of Art 5.1, being to base their measures on the conclusions in the reports ⁽¹¹²⁾, nor the substantive requirements of that Article ⁽¹¹³⁾. That is, the European Communities did not discharge their burden of proof to show that they had taken into account studies of the scientific risk presented by using hormones for growth promotion purposes when implementing the hormone measures ⁽¹¹⁴⁾; nor that the scientific conclusion reflected in the European Communities' hormone measures conformed to any of the scientific evidence referred to the European Communities ⁽¹¹⁵⁾.

New Scientist, 2122, 21 February, 11 at p. 11. Taking advice from a number or group of experts, as the Panel did in the Hormone dispute, diminishes the chances that the consensus opinion is not represented. Allowing the parties to each choose representatives to advise the Panel ensures that a wider spectrum of views can be aired. This reduces some of the concerns expressed in Kleiner, but it is well for Panels to remain vigilant that they are not being 'blinded by the science'.

(111) At para 8.111 US Panel Report; para 8.114 Canada Panel Report. The European Communities had enacted measures with respect to MGA without conducting a risk assessment. The measures were therefore inconsistent with Article 5 of the *SPS Agreement*.

(112) "In our view, the Member imposing a sanitary measure needs to submit evidence that at least it actually *took into account* a risk assessment when it enacted or maintained its sanitary measure in order for that measure to be considered as *based on* a risk assessment". Para 8.113 US Panel Report; para 8.116 Canada Panel Report.

(113) "we find that the European Communities has not demonstrated that the scientific evidence it referred to, which generally addresses the safety of some or all of the hormones in dispute, would indicate that an identifiable risk arises for human health from the use of these hormones for growth promotion purposes if good practice is followed. In this respect we recall that all scientific experts advising the Panel confirmed this conclusion and stated that, as of today, no scientific evidence is available which concludes that an identifiable risk arises from the use of any of the hormones at issue for growth promotion purposes in accordance with good practice". Para 8.134 US Panel Report; para 8.137 Canada Panel Report.

(114) Paras 8.114-116 of the US Panel Report; paras 8.117-119 Canada Panel Report.

(115) Para 8.134 and 137 of the US Panel Report; paras 8.137 and 140 Canada Panel Report.

The Appellate Body criticised Panel's exposition of a minimum procedural requirement that a defendant must show that they took into account the conclusions of the risk assessment, pointing out that there is no 'minimum procedural requirement' set out in the text of the *SPS Agreement* and the test set by the Panel was in any event unhelpful. According to the Appellate Body, the Panel's interpretation would allow studies to be taken into account and nevertheless ignored.

The Appellate Body stressed that there must be an *objective* and substantive relationship between the risk assessment and the standards adopted, that is "the results of the risk assessment must sufficiently warrant — that is to say, reasonably support — the SPS measure at stake. ... there [must] be a rational relationship between the measure and the risk assessment" (116). It found the Panel's approach to whether the substantive requirements of Article 5.1 had been met was useful in this respect.

To determine whether a substantive relationship existed, the Panel (117).

identif[ied] the scientific conclusions reached in the risk assessment and the scientific conclusions implicit in the SPS measures; and ... [then] examin[ed] those scientific conclusions to determine whether or not one set of conclusions matches, i.e. conforms with, the second set of conclusions.

The Appellate Body agreed with the Panel that the available risk assessments presented by the European Communities did not "rationally support the European Communities import prohibition" (118). It is interesting to note that the Panel and the Appellate

(116) Para 193, Appellate Body Report.

(117) Para 8.117 US Panel Report; para 8.120 Canada Panel Report; quoted at para 192 Appellate Body Report.

(118) Para 197 Appellate Body Report. The Appellate Body noted at this stage that, despite the fact that the Panel had incorrectly not required the United States or Canada to prove, *prima facie*, that the European Communities had not based their measures on a risk assessment, that sufficient evidence was available to show that a risk assessment within the terms of Article 5.1 did exist for all hormones the subject of the dispute except MGA.

Body's deference to European Communities' science on this point allowed the European Communities to be 'hoist on their own petard'. The expert opinion gathered by the Hormone Panel helped to shore up the case against the European Communities, increasing the persuasiveness of the judgment and possibility the 'palatability' of the result to European consumers.

Finally, the Appellate Body identified for the European Communities the means by which they could re-tailor their ban so as to comply with the *SPS Agreement*. It pointed out that whilst detailed studies had been presented to the Panel which discussed the health effects of hormones applied according to *good* veterinary practice, the details of the studies which examined the risks associated with hormone *abuse* — for example those made in conjunction with the Pimenta Report — were *not* put before the Panel. Demonstrating an objective relationship between the risk assessment and the national standards currently in place would require the results of such a study. The Appellate body accepted that the political decision to ban the hormones appeared to rest on the risk to humans if the hormones were abused, but was unable to find that this was based upon a risk assessment as required by Article 5.1.

The Appellate Body pointed out that it was entirely appropriate for risk assessments to take into account the circumstances of how a product was produced, whether the hormones could have been properly or improperly administered, the economic incentives for doing so, and so on. Risk assessments do not have quantitative requirement, that is they do not have to "establish a minimum magnitude of risk" as some of the language in the Panel Reports seemed to suggest ⁽¹¹⁹⁾. The Appellate Body also held that a risk assessment does not have to arrive at a 'monolithic' conclusion, but may represent both 'mainstream' and 'divergent' scientific opinions. Moreover, it could be entirely within the terms of the *SPS Agreement* for a responsible and representative government to choose to base

(119) Para 186 Appellate Body Report, discussing the Panel's use of the term 'identifiable risk' in certain portions of its judgments. See US Panel Report 8.124, 8.134, 8.136, 8.151, 8.153, 8.161, 8.162; Canada Panel Report 8.127, 8.137, 8.139, 8.154, 8.156, 8.164, 8.165.

its SPS standards on the body of divergent opinions “coming from qualified and respected sources”. Reflecting ‘divergent’ opinion in SPS standards was especially reasonable “where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety” ⁽¹²⁰⁾.

It should be noted that language of “clear and imminent threat” used by the Appellate Body is not to be found in the *SPS Agreement*, nor is sensible to limit the acceptance of divergent science to these situations only. A risk which is sizeable yet distant because of the cumulative effects of factors contributing to the risk should not be marginalised merely because it is supported by qualified and respected albeit ‘divergent’ opinion. This would be to ignore the manner in which scientific opinion is constructed. Rather than science being a slow accretion of facts leading to inevitable conclusions with whom all parties are in accord, science often proceeds by ‘lurches’ when unexpected discoveries and compelling syntheses promotes a revision of thinking such that an area previously regarded as a minority position becomes the new mainstream. Take for example Rachel Carson’s publication of *Silent Spring* which heralded a shift in attitude towards the incremental effects of pesticides on human health and the environment ⁽¹²¹⁾. It is important that nations be allowed to implement SPS measures from the time in which the minority opinion gains sufficient credibility that the mainstream is starting to take notice of the scientific concerns raised, regardless of whether there has been a landslide movement to embrace that opinion.

That having been said, the complete eradication of risks is a worthy goal to strive for yet is ultimately unrealistic. The central question for society remains not whether we want to live with risk, but what sorts of risks we do want to live with, and how we are to prepare to deal with the risks when the inevitable eventuates ⁽¹²²⁾.

(120) Para 194 Appellate Body Report.

(121) R. CARSON (1963). *Silent Spring*. Hamish Hamilton, London.

(122) C.H. SCHROEDER (1986). *Rights against risk*. *Columbia Law Review*, 86,495-562; C.P. GILLETTE and J.E. KRIER (1990). *Risk, courts and agencies*. *University of Pennsylvania Law Review*, 138, 1027-1109; J. HANDMER, B. DUTTON, B. GUERIN, and M. SMITHSON (eds.) (1991). *New Perspectives on Uncertainty and Risk*.

The WTO panel has provided important insights into how these elements are to be balanced in the future. Members do not have a free hand to implement any standard without it being backed up by a thorough risk assessment. The WTO will not accept the risk assessment unquestioned, but will seek expert opinion to inform them of the current strands of scientific opinion on the issue. Members may implement standards which reflect divergent scientific opinion if it is from a sufficiently qualified and respectable source, however they must show sufficient connection between the risk assessment and the standards in place. The problem with the European ban was there was no such connection.

8. *Consistency of Levels of Protection and Resulting Discrimination or Restriction on International Trade.*

One of the goals of the *SPS Agreement* is to encourage Members to maintain standards which are internally consistent. This is a goal, not a legal obligation. In order to promote that goal, Article 5.5 sets out the requirement that:

... Members shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. ...

Furthermore, Article 5.5 must be read in context with Article 2.3 which points out:

Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

Article 5.5 consists of three mandatory elements, set out by the Appellate Body at paragraph 214 of its report ⁽¹²³⁾:

1. the Member ... has adopted its own levels of appropriate protection against risks to human life or health in several different situations,
2. the levels of protection exhibit arbitrary or unjustifiable differences ("distinctions" in the language of Article 5.5) in their treatment of different situations, and
3. the arbitrary or unjustifiable differences result in discrimination or a disguised restriction of international trade.

To compare levels of protection existing in different situations, situations where the same substance or the same health effects are involved may be compared. The European Communities had adopted differing levels of protection in respect of:

- i) natural hormones used for growth promotion purposes,
- ii) natural hormones occurring endogenously in meat and other foods,
- iii) natural hormones used for therapeutic or zootechnical purposes,
- iv) synthetic hormones when used for growth promotion purposes, and
- v) the use of carbadox and olaquinox, anti-microbial which promote growth in piglets, and are known carcinogens.

Distinction between the levels of protection for natural hormones present endogenously in meat and other foods and natural hormones which were added for growth promotion purposes were found to be justifiable by the Appellate Body, overturning the Panel's ruling. The Appellate Body's finding here shows tolerance of a consumer's natural suspicion of food additives (whether or not the suspicions are scientifically justified) as well as pragmatism. The Appellate Body is scathingly eloquent on this point ⁽¹²⁴⁾:

to prohibit totally the production and consumption of such foods [in which hormones occur endogenously] or to limit the residues of naturally-occurring hormones in food, entails such a

(123) See also para 8.174 of the US Panel Report; para 8.177 Canada Panel Report.

(124) Para 221 Appellate Body Report.

comprehensive and massive governmental intervention in nature and in the ordinary lives of people as to reduce the comparison itself to an absurdity.

Differences in levels of protection between natural hormones used for growth promotion purposes and for therapeutic or zootechnical purposes were also considered justifiable by the Appellate Body because of the differences in modes of administration of the hormones. Differences between the levels of protection regarding natural and synthetic hormones used for growth promotion purposes and carbadox and olaquinox were, on the other hand, found to be *unjustifiable* in the sense of Article 5.5. Despite being known carcinogens, the standards for carbadox and olaquinox were set considerably lower than the hormone standards.

This last finding did not mean that the measures were incompatible with Article 5.5. The Appellate Body stressed that all three elements of that Article had to be satisfied for a contravention to have occurred. In this respect the Appellate Body *overruled* the Panel's finding that the distinctions in levels of protection resulted in discrimination or a disguised restriction on international trade. It firstly overruled the manner in which the Panel applied existing WTO law to the interpretation of this section of the Article, and then overruled the inference the Panel derived from the documents preceding and accompanying the enactments of the European Communities Hormone Directives that the European Communities had protectionist motivations for enacting a ban on total hormone use. The Appellate Body stated that these documents and other evidence before the Panel ⁽¹²⁵⁾:

makes clear the depth and extent of the anxieties experienced within the European Communities concerning the results of the general scientific studies (showing the carcinogenicity of hormones), the dangers of abuse (highlighted by scandals relating to black-marketing and smuggling of prohibited veterinary drugs in the European Communities) of hormones and other substances used for growth promotion and the intense concern of consumers within the European Communities over the quality and drug-free character of meat available in its internal market.

(125) Para 245 Appellate Body Report.

Therefore it appears that once the European Communities completes a proper risk assessment of the actual risks of hormone *abuse* occurring somewhere in the meat production chain, and the possible impacts of hormone abuse on human health, that they may re-enact hormone standards which sensibly reflect that risk. These standards will have a good chance of being not discriminatory, even if they are set high and do not reflect the same level of protection as that pertaining to carbadox and olaquinox. As stated by the Appellate Body, perfect consistency is not an ambition of the *SPS Agreement*, “it is only arbitrary and unjustifiable [and discriminatory] inconsistencies that are to be avoided” ⁽¹²⁶⁾.

8.1. *De-coupling the jurisprudence of the SPS Agreement and the GATT.*

To interpret Article 5.5, the Panel combined a reading of Article 2.3 of the *SPS Agreement*; the chapeau of Article XX of GATT, in particular the Report of the Appellate Body *United States — Standards for Reformulated and Conventional Gasoline* discussing the interpretation of the words “arbitrary or unjustifiable discrimination” and “a disguised restriction on international trade”; and the Appellate Body Report on *Japan — Taxes on Alcoholic Beverages* on the interpretation of Article III:2 of GATT where it was emphasised that “directly competitive or substitutable” products which are “not similarly taxed” are not necessarily in violation of Article III:2, the dissimilar taxation must also be “applied ... so as to afford protection to domestic production” ⁽¹²⁷⁾.

Despite indicating that the *SPS Agreement* was a ‘stand-alone’ Agreement, the WTO Panel considered that a considerable cross-fertilisation of jurisprudence from the GATT would be useful. Parallels in the language of Article XX and Article 2.3 and 5.5 of the *SPS Agreement* make this reading attractive. The notion of the *SPS Agreement* helping to “elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or

(126) Para 213, Appellate Body Report.

(127) Appellate Body Report on *Japan - Taxes on Alcoholic Beverages*, adopted on 1 November 1996, WT/DS8/AB/R, p. 30. Para 8.183 US Panel Report.

phytosanitary measures, in particular the provisions of Article XX(b)" — which also includes the chapeau of that Article — also supports this ⁽¹²⁸⁾.

The Appellate Body was critical of this approach, finding ⁽¹²⁹⁾:

In view of the structural between the standards of the *chapeau* of Article XX and the elements of Article 5.5 of the *SPS Agreement*, the reasoning in or Report in *United States - Gasoline*, quoted by the Panel, cannot be casually imported into a case involving Article 5.5 of the *SPS Agreement*.

In relation to the Panel's attempt to bind the jurisprudence of the GATT and *SPS Agreement* together by using Article III:2, second sentence, as a guide on how dissimilar treatment to 'like products' might be understood to be protectionist, the Appellate Body said ⁽¹³⁰⁾:

... it is similarly unjustified to assume applicability of the reasoning of the Appellate Body in *Japan - Alcoholic Beverages* about the inference that may be drawn from the sheer size of a tax differential for the application of Article III:2, second sentence, of the GATT 1994, to the quite different question of whether arbitrary or unjustifiable differences in levels of protection against risks for human life or health, "result in discrimination or a disguised restriction on international trade" ⁽¹³¹⁾.

Article 5.5 of the *SPS Agreement* requires an analysis of dissimilar treatment accorded not only to 'like' products, but also to 'like' health effects linked to 'like' 'contaminants' — that is like *situations*. Such a linking of the jurisprudence not only diminishes the

(128) Preambular statement to the *SPS Agreement*.

(129) Para 239, Appellate Body Report.

(130) Para 239, Appellate Body Report.

(131) The differential involved in *Japan - Alcoholic Beverages* was a tax differential, which is very different from a differential in levels of protection. Unlike a differential in levels of protection, a tax differential is always expressed in quantitative terms and a significant tax differential in favour of a domestic product will inevitably affect the competitiveness of imported products and thus afford protection to domestic products. There is a clear and linear relationship between a tax differential and the protection afforded to domestic products. There is, however, no such relationship between a differential in levels of human health protection and discrimination or disguised restriction on trade.

ability of Members to treat risks differently for non-protectionist reasons under the *SPS Agreement* (this may be as a result of, amongst others things, resource availability, national priorities, or consumer concern), but it could have been used to open up the ambit of Article III:2, second sentence, of the GATT 1994 in a manner not intended. This could only happen if a loose reading of Article III:2 occurred, however it is precisely such a reading that the Appellate Body criticised the Panel for in relation to many aspects of the *SPS Agreement*.

It should be noted that the Panel was fairly circumspect in setting the limits of what situations were 'comparable'. Either the same substance or the same adverse health effect were comparable; comparing all different sanitary risks to human health was not appropriate ⁽¹³²⁾. Thus whereas the health risk from eating beef or pork containing similar levels of hormones or hormonal effects were 'comparable', the health risk from consuming hormone treated meat with other but equally serious health risks such as consumption of pesticides or heavy metals, toxins or disease causing organisms such as salmonella, were not comparable ⁽¹³³⁾. This means that when analysing the compliance of Members with the *SPS Agreement*, only a small section of the Members sanitary measures will be subject to scrutiny and not the whole gamut. Rather than requiring a total re-think of all Members' sanitary measures, Members may choose to be very risk adverse in some categories (such as antibiotic use or pesticides) but not in others (such as hormones). The measures must however be internally consistent and be based on scientific principles.

Although the comments of the Appellate Body in relation to mingling Article XX jurisprudence with that of Article 5.5 of the *SPS Agreement*, do not as emphatically rule out its applicability as that of Article III:2, second sentence, there is reason other than the structural differences of the above provisions to integrate the jurisprudence with caution.

(132) Para 8.176 US Panel Report; para 8.178 Canada Panel Report.

(133) For Canada's submission on the type of risks to be compared see Paras 292-293 Canada Panel Report.

Waincymer argues that the Appellate Body in the Report of the Appellate Body *United States - Standards for Reformulated and Conventional Gasoline* read a 'reasonableness' and 'foreseeability' test into the chapeau of Article XX, which in its application effectively results in a 'necessity' test. In doing so he writes "Critics could ask why the Appellate Body did not see an intended distinction in meaning through the use of the distinct terms — "arbitrary," "unjustifiable," and "disguised" — as opposed to the term "necessary" (134).

The Hormone Reports do not address this issue when taking from the jurisprudence of the Appellate Body in *United States - Standards for Reformulated and Conventional Gasoline* to interpret the terms "arbitrary or unjustifiable discrimination" and "a disguised restriction on international trade" appearing in Article 5. This is not surprising as the *SPS Agreement* by in large extends Article XX(b) of the GATT which itself requires a necessity test. However is the test for the compliance of measures in the *SPS Agreement* as strict as under Article XX(b), and as argued by Waincymer, the chapeau of Article XX of the GATT?

Under Article XX GATT law, a measure is not 'necessary' unless it is the *least GATT-inconsistent* measure available (135). The *SPS Agreement* imposes a 'necessary' test on measures applied for

(134) J. WAINCYMER (1996) *supra* note 69 at p. 175.

(135) In the Report of the Panel on *United States - Section 337 of the Tariff Act of 1930*, the Panel ruled in the context of Article XX(d) that for a measure to be 'necessary' it must be *least GATT-inconsistent*. Adopted 7 November 1989, L/6439, 36S/345, 392; at para 5.26 the Panel stated "a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions". This test was subsequently applied by the Panel in Report of the Panel on *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes* when interpreting Article XX(b) (DS10/R, adopted 7 November 1990, 37S/200, 223) and followed in Report of the Panel on *US - Restrictions on Imports of Tuna* GATT Doc DS 29/R June 94 (unadopted) and by the Panel in World Trade Organization: Report of the Panel in *United States - Standards for Reformulated and Conventional Gasoline* (1996) 35 ILM 603.

sanitary and phytosanitary purposes ⁽¹³⁶⁾, however as Note 3 to Article 5.6 states “a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is *significantly* less restrictive to trade” (emphasis added). This implies that rather than merely conceiving that alternative and reasonably available measures which are less GATT-inconsistent do exist, the Panel must be convinced that the measures are *significantly* less restrictive to trade than the existing measures. The burden of proof for this proposition would presumably rest on the defendants to show that they had considered other alternative measures and that their trade restrictiveness was not significantly less than the existing measure. This is not quite a proportionality test as the measure does not have to be shown to be proportionate to the harm, however it appears to be tending in this direction and away from the strict least GATT-inconsistent test of Article XX(b).

The criteria for the necessity test under the *SPS Agreement* and whether it is less strict than that under the GATT as a result of Note 3 Article 5.6 was not considered by the Panel. They avoided a consideration of the application of Note 3 to Article 5.6 by stating ⁽¹³⁷⁾:

Since we found above that the EC level of protection reflected in the EC measures in dispute has been adopted in violation of Article 5.5, we do not consider it necessary to further examine whether these measures are also more trade restrictive than required to achieve that level in the sense of Article 5.6.

(136) Article 2.2 of the *SPS Agreement* requires that “Members shall ensure that any sanitary or phytosanitary measures is applied *only to the extent necessary* to protect human, animal or plant life or health” (emphasis added). Article 3.2 states that “measures which conform to international standards, guidelines or recommendations *shall be deemed to be necessary* to protect human, animal or plant life of health” (emphasis added) and 3.3 that although “Members shall base their ... measures on international standards” etc. *where they exist*; they may choose a higher standard if there is a “scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines [it] to be appropriate in accordance with the relevant provisions of paragraphs 1 through to 8 of Article 5”.

(137) Para 8.247 US Panel Report.

From this statement it appears that Article 5.6 is to be considered only if distinctions are *not* arbitrary or *are* justifiable, *and* are also trade restrictive ⁽¹³⁸⁾. Alternative and less trade restrictive measures to avoid risk must be assessed taking into account their technical and economic feasibility. It is unclear whether this would also include an assessment of the political feasibility of the alternative measures being accepted by the community at risk but clearly the comments made by the Appellate Body in relation to consumer concerns over the risks of hormone abuse make this issue relevant ⁽¹³⁹⁾. As the Agreement requires that alternative measures must be assessed upon the basis of whether they are *reasonably available* ⁽¹⁴⁰⁾, this opens the possibility for a politically based assessment to be made. It is ironic that such an investigation would open the WTO to criticisms regarding incursions to national sovereignty and is likely to be avoided on this ground.

8.2. *The precautionary principle.*

Another area in which the WTO Panel appeared to demonstrate some indication of having heard its critics is in its treatment of the application of the precautionary 'principle' to the *SPS Agreement*. The precautionary principle envisages the prevention of adding certain substances or conducting certain activities "even if there is no conclusive scientific proof linking that particular substance or environmental activity to environmental damage" ⁽¹⁴¹⁾, however there is some doubt as to exactly how far it extends and whether it can actually be considered to be a principle in international

(138) It should be noted that the Panel's finding in relation to Article 5.5 of the *SPS Agreement* was reversed by the Appellate Body, but that the Appellate Body did not believe that sufficient findings of fact had been made by the Panel to sustain a finding in relation to Article 5.6. It therefore did not overrule the Panel's finding in relation to Article 5.6. Para 251 Appellate Body Report.

(139) D. ESTY (1994) *supra* note 62.

(140) See *SPS Agreement*, Note 3 to Article 5.6.

(141) J. CAMERON and J. ABOUCHAR (1991). *The precautionary principle: a fundamental principle of law and policy for the protection of the global environment*. *Boston College International and Comparative Law Review* 14:2.

law ⁽¹⁴²⁾. Whilst Canada argued that the principle did not form part of either international law or international law, the European Community argued that it did and that the *SPS Agreement* should be read as including that principle ⁽¹⁴³⁾. Not only did many of the World's nations agree to recognise the precautionary principle as part of the non-binding documents arising out of the United Nations Conference on the Environment and Development (UNCED), the European Communities pointed out that the precautionary principle forms a fundamental part of the European Treaty. The United States did not deny the existence of the precautionary principle, merely that it was expressed in Article 5.7 which the European Communities expressly said that it did not rely on ⁽¹⁴⁴⁾.

The Panel refused to take up the invitations of either Canada or the European Communities, adopting instead the example of the United States stating:

To the extent that this principle could be considered as part of customary international law *and* be used to interpret Articles 5.1 and 5.2 on the assessment of risks as a customary rule of interpretation of public international law (as that phrase is used in Article 3.2 of the DSU), we consider that this principle would not override the explicit wording of Articles 5.1 and 5.2 outlined above, in particular since the precautionary principle has been incorporated and given a specific meaning in Article 5.7 of the *SPS Agreement*. We note, however, that the European Communities has explicitly stated in this case that it is not invoking Article 5.7.

We thus find that the precautionary principle cannot override our findings made above ⁽¹⁴⁵⁾.

It is not surprising that the WTO failed to expressly admit to the precautionary principle given both the uncertainty in its application, and the only recent of trend of integrating certain well established

(142) J. CAMERON and J. ABOUCHAR (1996). *The status of the precautionary principle in international law* in *The Precautionary Principle and International Law: the Challenge of Implementation*. D. FREESTONE and E. HEY, *The Hague*, Kluwer Law: 29-52.

(143) Paras 210-216 Canada Panel Report.

(144) Para 207 US Panel Report.

(145) Paras 8.157 - 8.158 US Panel Report; 8.160 8.161 Canada Panel Report.

international law concepts into the WTO legal system ⁽¹⁴⁶⁾. In the wake of the report of the Committee of Trade and Environment to the WTO First Ministerial Meeting, December 1996, there has been some concern that the WTO is not living up to the commitment it has made to furthering trade with a view to encouraging sustainable development evident in the preamble to the WTO Agreement.

The worrisome banishment of the precautionary principle, to the extent that it might exist in the *SPS Agreement*, to Article 5.7 has been remedied by the Appellate Body's comment that "there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle" ⁽¹⁴⁷⁾. However the Panels' comments which appear to indicate a cautious acceptance that emerging international environmental principles may influence its jurisprudential development have to some extent been undermined by the Appellate Body's distinction between customary international *environmental* law, and *general* or *customary international law* ⁽¹⁴⁸⁾. Moreover, the Appellate Body Report omits to indicate that the writings it refers to demonstrate that the status of the acceptance of the precautionary principle into international environmental law were written primarily before UNCED, and that since that time an unprecedented number of international and multilateral environmental agreements have been entered into between States in which embrace that principle. Thus whilst the comments encourage some tolerance of the WTO's ability to balance environmental and trade issues with a modicum of sensitivity, this will be enhanced by the text of the Agreement being interpreted in a precautionary way where the ordinary rules of interpretation so allow.

8.3. *The effect of the hormone ruling.*

The Appellate Body ruling has left a debate waging between the United States and the European Communities as to who has actually

(146) Reference to the Vienna Convention Legal Treaty as a means of interpreting the GATT is now standard in WTO Panel and Appellate Body Reports. The integration of other international law principles into GATT law is less noticeable.

(147) Para 124 Appellate Body Report.

(148) Para 123 Appellate Body Report (emphasis in original).

won this case. Whereas the European Communities is taking the position that it may keep the present ban in place until it completes the risk assessment procedures again, the United States and Canada state that Europe must remove the ban immediately. Europe has indicated that it will take up to four years to redo their risk assessments and modify the 96/22 Directive accordingly.

The ruling also brings to light the possible need for the European Communities to examine whether the carbadox and olaquinox standards are actually set high enough. The *SPS Agreement* does not however include a mechanism for raising standards, only assessing whether they are too high.

A final point to make is that it is quite difficult to detect hormone abuse, thus throwing into doubt the ability of the hormone ban to be properly enforced even after the revised risk assessment has been done. Using hormones for growth promoting purposes do appear to give in some cases significant financial rewards, causing some producers using not only the banned hormones discussed above, but also more dangerous drugs such as clenbuterol ⁽¹⁴⁹⁾. The widespread abuse of hormones indicates that consumers are right to be concerned about the health risks involved, although distinguishing between the health effects of hormones applied properly and those misused is important. It also emphasises that the political reaction has failed to adequately address the source of that concern, and that mechanisms other than a blanket ban are necessary. One suggestion for resolving this issue is to allow consumers to choose whether they are willing to eat hormone treated meat. The United States has indicated that it will not tolerate labelling requirements which state the meat is 'hormone treated'. It is unlikely that meat labelled in this way would be attractive to consumers, and producers already engaging in illegal hormone use would be unlikely to comply with this requirement as the consumers would provide them with little incentive.

(149) Clenbuterol is apparently responsible for 135 people in Spain being hospitalised after eating contaminated meat, and for the death of farm workers in Ireland from mixing it with animal feed. Suggestions indicate that Spain, Italy and Belgium have a very high incidence of illegal hormone use, and that Germany has a black market in veterinary drugs which is worth \$150 million.

Conclusion.

During the past decade, the hormone ban has been one of the most significantly disputed non-tariff trade barriers. The ensuing Hormone dispute has raised fundamental questions about the ability of nations to enact legislation to address the concerns of their citizens and which have the citizens' popular support. If nations want to enjoy the benefits of being part of a global community, they have to accept the inevitable loss of sovereignty which this involves. The WTO rulings on the Hormone dispute influences to what extent this is true in the area of environmental protection and consumer health and safety, the jurisprudence clarifying the restrictions imposed by the *SPS Agreement* on the ability of Member States to develop laws which have an effect on international trade.

The Hormone Reports provide crucial insight into the relationship between the *SPS Agreement* and GATT, in particular Article XX and its associated jurisprudence; the burden of proof; the standard of review; the significance of scientific evidence to justify SPS measures; and the importance of finely targeting risk assessments to properly assess and reflect a Member's and consumer concerns at issue.

International standardisation organisations will clearly have a more prominent role to play in driving the development of environment, health and safety standards. Whether this will lead to a 'regulatory chill' amongst those bodies is yet to be seen. The *SPS Agreement*, particularly following the clarification of its terms by the Appellate Body, allows reasonable scope for Members to develop sanitary standards higher than international standards, so the (possible) 'chill' may not be severe.

National scientific organisations should also gain considerably more influence within Members enacting sanitary regulations. As the Hormone Reports carefully demonstrated, the legitimacy of the Hormone ban ultimately hinged on the evidence provided in the scientific reports commissioned by the European Communities' inquiries. The scientific experts opinions gathered for the WTO inquiry merely backed up the European Communities' findings.

The innovation of the *SPS Agreement* is that in Article 11.2

Panels are encouraged to consult experts on scientific issues relevant to a dispute. Not only does this show signs by the negotiators of the Agreement listening to the concerns of the environmental community regarding the competence of the WTO to decide on complex scientific matters, it lends persuasiveness to the outcome of the Reports and therefore strengthens the WTO's credentials to hear and settles international disputes into the future.

Although the 'precautionary principle' in the development of international environmental (and consumer) law received only brief treatment in the Hormone Reports, the *SPS Agreement* itself attempts to rationalise protectionist vs. precautionary trade barriers on the basis of science. As the world moves to increasingly liberalised trade with the dismantling of tariffs, we will see increasing reliance upon non-tariff trade barriers by sectors looking for alternative ways to protect their markets. We are also going to see increasing reliance upon similar trade barriers by consumer and environmental groups concerned about the manner in which goods are produced and their health effects. The *SPS Agreement* provides a means to prevent nations presenting protectionist causes as environmental and consumer concerns, or overblowing superficial, local or emotive issues without a rational scientific basis.

Following the release of the Hormone Panel Reports, the EC Commissioner for Agriculture, Franz Fischler charged that the decision finding the European Communities Hormone ban inconsistent with the *SPS Agreement* was indication that 'democracy was at risk of the WTO'. The Appellate Body corrected the Panel's overstrict approach to assessing SPS standards implemented by Members and its report has been considered to be far more acceptable to the Europeans. Most importantly it clarified for the Parties measures which it would and would not accept: measures aimed at hormone abuse where insufficient evidence supported the both the incidence of abuse and the likely consequences were not acceptable under the *SPS Agreement*, measures based on reliable data were. The European Communities retains the democratic right to protect itself from risks, but it must at least show some evidence that there is scientific foundation for the fear. How certain that evidence must be is not yet altogether clear, and interpreting Agreement in light of the precau-

tionary principle will be important here. Additionally, the *SPS Agreement* permits a Member to exercise their democratic right to prevent products entering its border in the absence of a risk assessment if a Member is willing to give compensatory access to its markets or take the consequences of retaliatory action sanctioned by the WTO rules.

Like the GATT Agreement, the *SPS Agreement* is concerned with balancing the rights and obligations of its Members trading with one another. Members have a right to enact the environmental and health and safety standards to suit themselves. They may enact high or low standards, however if the standards are higher than internationally agreed standards then they must be justified according to certain criteria of which scientific justification and consistency is paramount.

Given the extreme sensitivity of consumers to even hints of food contaminants, and the traditional scepticism of consumers of produce from other nations, the outcome of the Hormone dispute was never going to be a satisfactory one. The WTO Appellate Body Report redresses some of the disparities of the Panel Report by taking into account the more 'human' elements of the ban, at the same time balancing these sensitivities with a strong eye towards maintaining the strength of the *SPS Agreement* to fend off the rise of green and consumer protectionism.

MARC MARESCEAU

COMMENTS

1. The basic idea in Esposito's contribution can be summarised as follows. First, international trade law functions at two different but inter-connected levels, namely at both international and domestic levels. Consequently, international trade law is of mixed character. Second, international trade law, as expressed through WTO law, obviously serves a general public interest and individuals are seen as possible beneficiaries of the international trade system. Linking these two assumptions together almost automatically leads to the crucial question as to whether WTO law "requires establishing methods of direct applications of international trade law." However, there is neither a quick nor an easy answer to this question. The spirit and wording of the WTO Agreement seen in the light of the existing case-law of the European Court of Justice on the effect of GATT provides somewhat contradictory signals.

The attitude of the Court of Justice to the issue of direct effect of GATT is well known. It was expressed in the *International Fruit Company* judgment of 14 December 1972 for the first time and was later confirmed in subsequent case-law. The Court denied the direct effect of GATT on the following grounds: the Agreement was based on the principle of negotiations undertaken on the basis of "reciprocal and mutually advantageous arrangements". The Agreement was characterized by the great flexibility of its provisions, as was illustrated, *inter alia*, by the measures for the settlement of disputes. These measures included, depending on the case, "written recommendations or proposals which are to be given sympathetic consideration, investigations possibly followed by recommendations, consultations between or decisions of the contracting parties, including

that of authorizing certain contracting parties to suspend the application to any others of any obligations or concessions under GATT and, finally, in the event of such suspension, the power of the party concerned to withdraw from the agreement" (*Bananas*, 1994, ECR I-5072).

Can the Court's aversion to the direct effect of GATT be maintained and transposed into the WTO Agreement? One might be inclined to answer this question in the negative since one of the most striking innovations of the WTO concerns precisely these provisions on the settlement of disputes. In this context it has, quite correctly, been observed that the new dispute settlement system is "a virtually complete judicial system" and in this new system "the losing party to the dispute (has) no longer ... the practical possibility of blocking the adoption of the panel report" (P.J. KUYPER, "The New WTO Dispute Settlement System: The Impact on the Community," in *The Uruguay Round Results: A European Lawyers' Perspective* (ed. Bourgeois a.o.), 1995, p. 104). Clearly, the strong rule-oriented structure of WTO as a whole has brought about a quasi-judicial mechanism for the settlement of disputes. This new situation takes away or, at least, weakens considerably the Court's main argument against direct effect. Is all this enough, however, to reverse its original position and to grant direct effect to the WTO Agreement in the legal order of the Community and before the courts of the Member States? After a careful balancing of the different approaches, Esposito's conclusion in this respect is that "the presence or absence of a dispute settlement system in the agreement does not control the direct effect analysis". While WTO law, by its very nature, contains norms directed towards private parties, direct effect of WTO law, according to the author, must nevertheless be excluded. The main reason for this is the clear intention or, better, the evident willingness of the Contracting Parties not to grant direct effect. This has been made clear in the implementing acts by some of the main actors such as the U.S. and the European Community. As far as the latter is concerned the preamble of the Council Decision on the conclusion of the WTO Agreement stipulates that the WTO Agreement, by its nature, was not susceptible to being directly invoked by the courts of the Community or the Member

States. Even those agreements signed within the WTO framework which, because of their content, go very far in the direction of incorporating norms directed towards individuals cannot really be used as an argument in favour of direct effect. The TRIPS-Agreement is perhaps the most revealing in this respect — and functions, so to speak, as an anti-climax — where it states that “it is understood that this part (of the Agreement) does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general”.

Perhpas a last point needs some further elucidation. The *Banana*-ruling of the Court came at a time when, in the GATT Council, the adoption of the panel report condemning the Community for its discriminatory legislation had ben blocked by the Community. In other words, the GATT dispute settlement procedure had not been fully completed. Would the ruling of the Court have been different if the procedure had been brought to an end? Be that as it may, the WTO, as already noted, is in this respect fundamentally different. Can Esposito's thesis that “the dispute settlement system ... does not control the direct effect analysis” remain intact if under the WTO procedures reports of the Panel or Appellate Body are adopted by the Dispute Settlement Body, knowing that the Dispute Settlement Body as a rule adopts such rulings automatically, except when there is consensus not to do so? Eeckout has raised the question where he writes that “it is no longer possible to argue, as the Court did in the *Banana* judgment, that the GATT/WTO rules are not unconditional and that an obligation to recognize them as rules of international law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme or terms of the GATT” (“The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems”, *CML Rev.*, 1997, pp. 35-36.) Certainly, Eeckout also recognises in principle — and that brings him up to a certain point, close to Esposito's main thesis based on the clear intention of the Parties that WTO should not have direct effect — that the multilateral trade liberalisation exercise “is firmly anchored to the principle of reci-

procuity" and "the granting of direct effect to the WTO agreement in the Community would be perceived at the political level as upsetting that delicate balance" (p. 37). But he also argues that Panel or Appellate Body reports adopted by the Dispute Settlement Body have a status of their own within the Community's legal order. In his view, where the Community is found to have violated WTO rules, the European Court of Justice cannot ignore this and should uphold the principle of legality. However, knowing that this would not be the reasoning followed in some of the legal orders of other Contracting Parties — such as the US — this conclusion is in conflict with the reciprocity principle. At any rate, it should not be ignored that the first point of reference in the Court's GATT case-law is that on the "*reciprocal* and mutually advantageous arrangements" of GATT (*italics added*). WTO is in this respect not different. This has led Advocate General Tesauro to suggest that the Court should reconsider its original approach based on the dispute settlement system in order to deny the direct effect of GATT (see Opinion 13 November 1997, *Hermès International v. FHT Marketing Choice*, C-53/96, not yet published). The real issue is that of the relationship between reciprocity and the multilateral character of WTO with its own institutional life. In the future, the Court should focus on the extent to which the granting of direct effect endangers or not that reciprocity principle.

2. An immense majority of public opinion in the European Union is obviously not prepared to accept the idea that hormones in meat could again be allowed. The issue of allowing hormones cannot be disconnected from the growing sensitivity among consumers in Europe for safe and healthy food. After the consumer confidence crisis as a result of the "mad cow" disease, allowing hormones in meat appears politically impossible. It is against this background that the EC is faced with a particularly acute and bitter trade dispute with the US. Apparently, in the US, meat production is heavily dependant on the use of growth promoting hormones at crucial stages of production. This implies not only the use of natural but also synthetic hormones. For more than a decade the US Government has lobbied in international fora to declare the use of

hormones safe but so far these attempts have been neither fully convincing nor successful. The use of WTO channels to reach these objectives is no doubt one of the most serious of these attempts and, perhaps, also the most rewarding one. Indeed, the 1997 WTO Panel Reports on this issue was disastrous for the EC. The EC lost on all fronts. In the view of the Panel, the EC Hormones ban was not based on risk assessment and thus it violated Article 5.1 SPS; by adopting arbitrary and unjustified distinction or disguised trade protection the EC had taken measures which resulted in discrimination or disguised trade restrictions contrary to Article 5.5 SPS; and the meat hormones ban was not based on existing international standards and no scientific evidence was provided as to why more stringent standards were necessary.

The Appellate Body in its Report of 16 January 1998, reviewed some of the Panel's basic findings and conclusions. It rejected, for example, that there was a breach of Article 5.5 SPS: in other words, it accepted a difference in levels of protection for hormones used for growth promotion purposes and for therapeutic purposes. The Appellate Body also reversed the Panel's view on the "evidentiary burden of proof". For the Panel there was a presumption of consistency with the SPS for measures which do conform to international standards: for those which did not conform to such standards the burden of proof had to be borne by the Member imposing SPS. The Appellate Body took the view that this penalised the Member taking SPS measures. No doubt, the most difficult issue was that of the proper "risk assessment". In this respect Article 5.1 SPS states that "Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations". Risk assessment is therefore the necessary foundation for all national SPS standards unless the measures conform to international standards. The Panel made a distinction between "risk management" which could include policy considerations involving social values and subjective judgements and "risk assessment" based on "scientific examination of data and factual studies". This separation between "risk management" and "risk

assessment" was criticised by the Appellate Body. Be that as it may, the Appellate Body nevertheless concluded that the available risk assessment produced by the EC did not focus specifically on residues in meat of hormone-treated cattle. At the same time, the Appellate Body also rejected the Panel's finding that an assessment of the risk to human health had to come to "a monolithic conclusion which coincides with the prevailing scientific view representing the mainstream of scientific opinion" and agreed with the EU "that responsible and representative governments may act in good faith on the basis of a divergent scientific view coming from qualified and respected scientists".

On 13 February 1998 the WTO Dispute Settlement Body adopted the ruling of the Appellate Body. The first EC reactions to the ruling of the Appellate Body were formulated in terms of "a victory for European consumers" since the Appellate body allowed the EC to establish on a scientific basis a level of consumer protection which was higher than the level resulting from international health standards (*Agence Europe*, 17 January 1998). However, as already mentioned, the Appellate Body also found that the hormones ban in the EC was not based on a valid risk assessment because the scientific studies did not focus sufficiently on residues in meat of hormone-treated cattle. Thus, the EC was asked under Article 21 DSU "to state its intention in respect of implementation of the recommendations and rulings of the Dispute Settlement Body". More specifically, Article 21.3 provides that if it is "impracticable for a losing WTO Member" to comply immediately with the recommendations and rulings of the Dispute Settlement Body it shall be given "a reasonable period of time to do so". This can be determined by mutual agreement or binding arbitration. The EC has stated it will carry out complementary risk assessments in the next 12 to 15 months. These will focus specifically on the potential health risks from hormone residues in meat and meat products and will be based on the most recent scientific knowledge concerning hormones. Meanwhile, taking into account its primary concern of health protection to consumers and safety of food, the EC will keep the hormones ban in place. It is expected that, in the risk assessment study, the EC will concentrate on the lack of efficiency of US meat

controls (a first EC report on this topic made available in February 1998 seems to indicate great insufficiencies in this respect, see *Le Monde*, 10 February 1998). One of the evident weaknesses of the situation resulting from the WTO Agreements is that these Agreements do not clearly stipulate how such an assessment should be carried out nor what levels of risk may justify health protection measures.

As could be expected, the US reaction to the EC's position was particularly sharp. According to the US Trade Representative the EC "is distorting the intentions of the WTO and undermining an effective rule-based trading system". Moreover, the US "will not tolerate any action by the EU relating to the hormone dispute short of full compliance with its SPS obligation" and, if necessary, sanctions will be taken. The EU's intention to conduct another risk assessment "was nothing more than a delaying tactic and blatant misrepresentation of the findings of the Appellate Body" (see Statement of US Secretary of Agriculture, in *Press Communiqué, American Embassy*, London, 13 March 1998). The US sees the decision of the Appellate Body not only as a victory on a particular issue but also as a clear indication that "there is no way to feed the world in a sustainable way without biotechnology". The first recent openings of the EC to imports of certain types of genetically modified maize were considered by the US to be a good first step in this direction.

In her conclusion to the ruling of the Appellate Body Wynter rightly observes that there is an increasing reliance on non-tariff trade barriers by consumer and environmental groups concerned about the manner in which goods are being produced. It may also be true that in such a move protectionist motives are not totally absent. However, this is an aspect of the question which the WTO organs dealing with the *Hormones* case have not deemed necessary to examine. Yet, it would have been interesting to see whether and to what extent the total hormones ban for growth promoting purposes has been effectively applied on EC produced beef by the authorities of the EC and of the Member States.

One of the most striking features of the *Hormones* case is the attempt by the WTO organs to make use of opinions of scientific experts. Although in the case in point these consultations were not

fully convincing it, as Wynter writes "strengthens the WTO's credentials to hear and settle international disputes into the future". But, no doubt, the most interesting part of the Appellate Body's ruling is that on the relevance of the *precautionary principle* in the interpretation of the SPS Agreement. While acknowledging the finding of the Panel that the precautionary principle did not override the provisions of Article 5 and 5.2 SPS, it nevertheless endorses this principle as being part of the SPS Agreement as such and not only within the framework of Article 5.7 SPS ("there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle".) Moreover, this principle may also be a relevant element for treaty interpretation. Yet the Appellate Body observes that the precautionary principle "does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the SPS Agreement". All this, however, is not crystal-clear and the analysis by the Appellate Body on this point is too cryptic. Paradoxically enough, this may also constitute one of the mainstrenghths of the WTO ruling and "(leave) the door open for the EC to return with evidence that would satisfy the scientific tests required under the SPS Agreement" (see J. CAMERON and K. CAMPBELL, "Challenging the Boundaries of the DSU through Trade and Environment Disputes", in *Dispute Resolution in the World Trade Organization* (ed. Cameron & Campbell), London, Cameron May, 1998, p. 219.) Of course, the fundamental question remains: are dispute settlement institutions operating within the structure of WTO sufficiently objective to take into consideration, as Wynter calls it, "the human dimension and political realities of the dispute?" Can a WTO Panel and WTO Appellate Body detach themselves in a sufficient manner from the strict trade oriented legal framework in which they operate? A comparison of the Panel Report with that of the Appellate Body gives an indication of the intensity of the issue but, unfortunately, cannot provide a fully convincing or reassuring answer.

TALIA EINHORN (*)

THE IMPACT OF THE WTO AGREEMENT ON TRIPS (TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS) ON EC LAW: A CHALLENGE TO REGIONALISM

SUMMARY: 1. Introduction. — 2. TRIPs: The necessary link between effective IP protection and international trade law. — 3. The TRIPs fundamental principles and their impact on EC law. — 3.1. The national treatment principle. — 3.2. The Most-Favoured-Nation principle. — 4. The legal framework for EC patent protection. — 4.1. The regional context. — 4.2. The international context. — 5. EC law revisited under TRIPs: The interface with competition. — 5.1. Exhaustion of rights. — 5.1.1. Japanese patent law. — 5.1.2. US patent law. — 5.1.3. EC law. — 5.1.4. The economic rationale. — 5.1.5. Exhaustion under TRIPs. — 5.2. Compulsory licences. — 5.2.1. General. — 5.2.2. The rules on compulsory licences under EC Law. — 5.2.3. The rules for compulsory licences under TRIPs. — 5.2.4. The effect of TRIPs on the EC rules regarding compulsory licences. — 6. Enforcement of rights and direct effect in the EC.

1. *Introduction.*

This study first examines the underlying rationale for TRIPs, and its two fundamental principles, the National Treatment principle and the Most-Favoured-Nation principle, and evaluates their impact on EC law. The latter in particular poses an imminent danger to regional agreements. The interface between patent law and competition law has been selected to elucidate this impact. It demonstrates the conflict between TRIPs and EC single market integration, regarded by the European Court of Justice as a major objective of EC law that has so far overshadowed the development of EC competi-

(*) This work has also been published in 32 *Common Market Law Review* (1998), pp. 1069-1099.

tion law. The study concludes that the "Chinese" wall, which the Court of Justice has been helping to build around the EC, should tumble.

There is only one way to delay this process or even prevent it from taking place. If the provisions of TRIPs are denied direct effect, then individuals will not be able to realize the rights granted to them under this agreement. A middle-way approach, applying a rule of interpretation, and perhaps even a rule of presumption that would ensure compatibility of national and regional legislation with TRIPs, may allow for a cautious step-by-step assessment. However, it would offer no easier solutions to weighty issues, such as the maintenance of regional "exhaustion of rights". The EC will have to make up its mind. Should it choose to comply fully with TRIPs, then regionalism will, by and large, have to be abandoned in favour of the general Most-Favoured-Nation treatment. Should it choose to preserve its internal market, it is submitted that this can only be achieved at the price of compromising the new legal order created by the EC, denying the citizens of the Community the very rights that have made the EC legal system unique, and denying the Community its claim to legitimacy. This is a devil's choice, to be sure, and a real challenge to regionalism.

2. *TRIPs: The necessary link between effective IP protection and international trade law.*

In order to encourage people to pursue their creative skills and invest in their development, a system of IP rights has been developed to protect the products of the mind reducible into tangible form ⁽¹⁾. Intangible property is especially vulnerable to misappropriation and

(1) Regarding the history of IP rights and the reasons for granting them see MACHLUP, *An Economic Review of the Patent System*, Study of The Subcommittee on Patents, Trademarks and Copyrights, of the Committee on the Judiciary, US Senate, 85th Congress, 2nd session (1958), 1-5, 20-44; SHERWOOD, *Intellectual Property and Economic Development* (Boulder: Westview, 1990), pp. 11-39; ABBOTT, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 *Vanderbilt Journal of Transnational Law* (1989), 689, 697-698.

requires a comprehensive system to protect all IP rights, as well as trade secrets. One missing part may endanger the entire system, like a dam with a hole in it ⁽²⁾. Finally, effective enforcement is needed.

The Paris Convention for the Protection of Industrial Property ⁽³⁾ and the Berne Convention for the Protection of Literary and Artistic Works, both administered by the World Intellectual Property Organization (WIPO), have been incapable of raising the overall standard of IP protection. They are governed by the principle of territoriality, leaving the scope and content of the rights at the discretion of national legislatures. The conventions ensure that national treatment be granted to nationals of other Members, who are entitled to benefit from all the advantages given by a Member to its own nationals. However, they hardly set any minimum standards of protection. Attempts to introduce such standards have failed repeatedly ⁽⁴⁾. The Members were unable to bridge the gaps between the conflicting approaches adopted by developed and developing States ⁽⁵⁾.

The principle of territoriality causes trade distortions due to differences between States in the level of protection and enforcement. Domestic IP regimes operate as a non tariff barrier to trade. GATT 1947 made its rules inapplicable to "measures necessary to secure compliance with laws or regulations ... relating to ... the protection of patents, trademarks and copyright, and the prevention of deceptive practices", provided that those "are not inconsistent with the provisions of this Agreement" (Article XX(d)). By shifting the dispute from special IP conventions to the GATT Uruguay

(2) SHERWOOD, *supra* note 1, pp. 53-55.

(3) Official English text of the Paris Convention of 20 March 1883, as revised and amended by 28 Sept. 1979 (World Intellectual Property Organization (hereafter: WIPO), 1996).

(4) See e.g. WO/INF/29 WIPO - World Intellectual Property Organization, GENEVA, *Existence, scope and form of generally internationally accepted and applied standards/norms for the protection of intellectual property*, September 1988, in BEIER and SCHRICKER (Eds.), *GATT or WIPO? New Ways in the International Protection of Intellectual Property* (Weinheim: VCH, 1989), pp. 213-319.

(5) KUNZ-HALLSTEIN, *The US Proposal for a GATT-Agreement on Intellectual Property and the Paris Convention for the Protection of Industrial Property*, in Beier and Schricker (1989), *op. cit.*, p. 75, at pp. 77-82.

Round, IP became one more debatable issue. In return for higher standards of protection, developed States could offer to open their markets to labour-intensive products made in developing countries and create a new balance of concessions ⁽⁶⁾.

TRIPs goes beyond rectifying the terms of trade between nations: first, by covering all basic forms of IP it strives to elevate the overall level of protection worldwide and create new international standards, both substantive and procedural, for the availability, scope and use of IP rights. Secondly, its preamble recognizes the substance of IP rights as private rights. Therefore enacting rules derogating from IP protection may amount to expropriation of private rights. Thirdly, TRIPs rules are supplementary to those of the existing international conventions (first recital of the Preamble, Articles 1(3), 2, 3(1), 4(1) TRIPs). WTO Members must comply with Articles 2-12 and Article 19 of the Paris Convention (1967 revised version).

Proper attention has also been paid to the needs of the developing countries, mainly by granting them longer transition periods (Articles 65, 66 TRIPs). The least developed countries were promised incentives to enterprises and institutions in their territories to promote and encourage technology transfer (Article 66(2)).

3. *The TRIPs fundamental principles and their impact on EC law.*

3.1. *The national treatment principle.*

The two fundamental GATT principles, National Treatment (hereafter: NT) and Most-Favoured-Nation (hereafter: MFN), apply to TRIPs (Article 3 and Article 4 respectively). Since IP rights are private property rights, these principles apply to nationals rather than to goods (as in GATT) or services (as in GATS) ⁽⁷⁾. This is in

(6) In general, see BRONCKERS, *The impact of TRIPs: Intellectual property in developing countries*, 31 CML Rev., 1245. Regarding India see BAROOAH, *Prolegomena*, in Bhorali (Ed.), *GATT Agreement or Dunkel Draft Treaty: Its Impact in Agriculture, Industry, TRIPs and TRIMs and Drug Industry* (1994), pp. 1-4; PAI SINGH, *The GATT Agreement Tripping and Trimming*, *ibid.*, 121 et seq.

(7) Under GATT 1947, violations of IP rights were referred to the GATT

line with the Paris Convention NT provisions (Articles 2 and 3), which require NT on the basis of nationality. Under Article 1(3) TRIPs, the nationals of other Members are those natural or legal persons qualifying as nationals under the Paris Convention. Article 3 Paris Convention extends the benefits to nationals of non-signatories, "domiciled" or having a real and effective industrial or commercial establishment in the territory of a Union Member.

As a rule, national treatment is opposed to reciprocity. Article 3 TRIPs makes TRIPs national treatment subject to the exceptions already provided in the Paris Convention ⁽⁸⁾. Under the Paris Convention, however, the only kinds of reciprocity required are based on the mutual commitments of each Member of the Union to grant NT to the nationals of the other, and to grant minimum protection where prescribed ⁽⁹⁾. It has been suggested that this is different under TRIPs, that by harmonizing substantial parts of substantive national IP law, NT should be interpreted as operating within the context of substantive reciprocity rather than in the context of minimum protection ⁽¹⁰⁾. The Members comply with the obligations not because they have undertaken to grant privileges to foreigners, but rather because they have entered into a deal securing

under the Art. III(4) GATT NT obligation, applied to bring complaints of nullification and impairment of benefits under Art. XXIII GATT. Such complaints were however limited by the general exception regarding IP protection of Art. XX(d) GATT. See e.g. GATT Panel Report *United States - Automotive Spring Assemblies*, adopted on 26 May 1983, [GATT] Basic Instruments and Special Documents (hereafter: BISD) 30S/107; GATT Panel Report *US - Section 337 of the Tariff Act of 1930*, 16 Jan. 1989, L/6439, adopted on 7 Nov. 1989, BISD 36S 1988-1989, 345; EVANS, *The Principle of National Treatment and the International Protection of Industrial Property*, 3 *European Intellectual Property Review* (hereafter: EIPR) (1996) 149, 154-156.

(8) GOVAERE, *Convergence, Divergence and Interaction of Regional Trade Agreements and the Agreement on TRIPs*, in DEMARET, BELLIS, GARCÍA JIMENEZ (Eds.), *Regionalism and Multilateralism after the Uruguay Round: Convergence, Divergence and Interaction* (Brussels: European Interuniversity Press, 1997), p. 465 at p. 489.

(9) KATZENBERGER, *General Principles of the Berne and the Universal Copyright Conventions*, in Beier and Schricker (1989), *supra* note 4, pp. 45-46.

(10) ULLRICH, *TRIPs: Adequate protection, inadequate trade, adequate competition policy*, 4 *Pacific Rim Law & Policy Journal* (1995), 153, 180, advocating such an approach under TRIPs.

comparable advantages to their nationals abroad. Such an interpretation cannot be squared however with the wording of TRIPs, which does not include a provision similar to that of the Paris Convention, providing that WTO Members may, exceptionally, substitute NT for a reciprocity requirement if this is in conformity with TRIPs.

By setting appropriate standards for IP protection, TRIPs creates a first impression that its NT clause strengthens the territoriality principle at the expense of free movement, and that the benefits of Article 3(1) TRIPs should only be extended insofar as higher standards of IP protection are involved. However, footnote 3 clarifies that "for the purpose of Articles 3 and 4, 'protection' shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of IP rights as well as those matters affecting the use of IP rights specifically addressed in this Agreement". Therefore, it is not only the rights of the proprietors that are guaranteed, but also those of licensees, parallel importers, distributors of goods with an IP content, and even IP pirates (regarding e.g. rules of enforcement). The NT clause may thus serve not only to enhance IP protection, but also, perhaps paradoxically, to lower the standards.

3.2. *The Most-Favoured-Nation principle.*

Whereas NT has applied in the previous IP Conventions, the extending of MFN Treatment to nationals of other Members is a novelty of TRIPs. The US original proposal already included an MFN provision ⁽¹¹⁾, supported by smaller and medium sized developed countries, such as Switzerland ⁽¹²⁾. The EC proposal, on the other hand, suggested only the inclusion of a non-discrimination principle ⁽¹³⁾. This is not surprising. An MFN extension could affect

(11) Suggestion by the United States for Achieving the Negotiating Objective - Revision, GATT-Doc.MTN. GNG/NG11/W/14Rev.1, para. VII.A (17.10.1988), brought in Beier and Schriker (1989), *supra* note 4, p. 189, at p. 201.

(12) Draft Agreement to the GATT on the Protection of Trade Related Intellectual Property Rights: Communication from Switzerland, MTN.GNG/NG11/W/73 (14.5.1990), Art. 102; REINBOTH, HOWARD, *The State of Play on the Negotiations on TRIPs (GATT/ Uruguay Round)*, 5 EIPR (1991) 157, 159.

(13) Guidelines Proposed by the EC for the Negotiations on TRIPs, GATT-

bilateral and regional agreements permitted as "special agreements" under the previous IP Conventions ⁽¹⁴⁾. The exclusion of such agreements from an MFN principle would have created distortions and exceptions to the principle ⁽¹⁵⁾. Alternatively, limiting the principle to a mere prohibition of arbitrary discrimination would have allowed preferential treatment of rightholders of selected countries. The omission of an MFN principle from TRIPs might have tempted States to seek a competitive advantage over their trade competitors by imposing bilateral agreements on third countries providing for stronger protection for their nationals than that required under TRIPs.

The TRIPs MFN principle makes no such exclusion. Therefore EC Member States are obliged, like any other WTO Member. Whereas both the GATT (Article XXIV) and the GATS (Article V) provide the basis for special rules applicable to regional integration, regional arrangements were not included in TRIPs. The reason apparently was that TRIPs, like the Berne and Paris Conventions, contains a very broad NT obligation which leaves little room for customs unions and free trade areas to provide for preferential treatment to regional trade partners ⁽¹⁶⁾. One may wonder whether such a provision was not included because the EC Commission expected the EC alone to be a Member of TRIPs, in which case the Member States would not have been obliged as such by these principles. Apparently, even when the Commission knew (in November 1993) that it would be joined by the Member States it failed,

Doc.MTN.GNG/NG11/W/16 (20.11.1987), para II, brought in Beier and Schricker (1989), *supra* note 4, p. 205, at 206; EEC proposal for a Draft Agreement on TRIPs, MTN.GNG/NG11/W/68 (29.3.1990).

(14) DHANJEE, BOISSON DE CHAZOURNES, *TRIPS: Objectives, Approaches and Basic Principles of the GATT and of Intellectual Property Conventions*, 24 JWT (1990/5) 5, 12-13.

(15) This is demonstrated e.g. by the granting, prior to the conclusion of TRIPs, of retroactive patent protection exclusively for US nationals in Korean laws: see COTTIER, *The Prospects for Intellectual Property in GATT*, 28 CML Rev., 383, 398.

(16) According to a study prepared under supervision of the WTO Secretariat: *Regionalism and the World Trading System* (WTO, 1995) 60-61; for the problems posed by regionalism cf. RIESENFELD, *The Changing Face of Globalism*, 72 *Chicago-Kent Law Review* (1996), 407.

due to the mistrust of the Member States, in its attempt to include an open statement directed at the other trade partners, in the form of a so-called disconnecting clause, to the effect that the relations between the EC Member States will be governed exclusively by Community law ⁽¹⁷⁾. Since the delimitation of rights and duties has remained invisible to third countries, these may insist upon MFN treatment, as soon as such a preferential treatment is given by one EC Member State to nationals of another. Such claims may be addressed to the Community, to any of its Member States or even to all of them, or to both the Community and its Member States ⁽¹⁸⁾.

In the past, the US has invoked the provisions of the Tokyo Subsidies Code, to demand rights accruing to it as a result of a subsidies agreement concluded by the EC ⁽¹⁹⁾. One of the first reports of the WTO Appellate Body was made in a case brought by the US against Canada ⁽²⁰⁾. A special exemption accorded to Canada in NAFTA prevented a claim under that regional agreement. Article 219 EC prohibits Member States from submitting disputes concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein. Yet, insofar as WTO covers issues not covered by EC Law (TRIPs being a case in point), this cannot be ruled out altogether. Member States could also be forced or tempted, as the case may be, to take different positions in cases brought by third countries against more than one of them.

In an attempt to save the special relations existing between the EC and the EEA Member States, the EC notified under Article 4(d) TRIPs both the EC Treaty and the EEA Agreement ⁽²¹⁾. Article 4(d)

(17) KUIPER, *The Conclusion and Implementation of the Uruguay Round Results by the European Community*, 6 EJIL (1994) 222, 228-229.

(18) Regarding the complications due to the joint participation see HILF, *The ECJ's Opinion 1/94 on the WTO - No Surprise, but Wise?*, 6 EJIL (1994) 245, 255.

(19) The Airbus case, (unadopted) panel report Doc. SCM/142; cf. KUIPER, *supra* note 17, 227.

(20) WTO Appellate Body (hereafter: AB) 1997-2 *Canada - Periodicals*, WT/DS31/AB/R (30.6.1997).

(21) On 19 Dec. 1995. The notification covers "not only those provisions directly contained therein, as interpreted by the Community as such and/or by the MSs, but also existing or future acts adopted by the Community as such and/or by

exempts from the MFN (although not from the NT) obligation any advantage, favour, privilege or immunity accorded by a TRIPs Member "deriving from international agreements related to the protection of IP which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council of TRIPs and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members". It is hard, by any stretch of the imagination, to view the EC and the EEA Treaties as related to IP protection ⁽²²⁾. The EC has not been the only one to seek an exclusion. The 1996 Report of the Council for TRIPs notes that by November 1996, 28 Members made notifications under Article 4(d) ⁽²³⁾. The report notes that some Members have expressed concern about some of the notifications, and suggests that criteria, in line with the Members' rights and obligations, should be developed to assist individual Members in making or reviewing their notifications.

The establishment of criteria for exemption under Article 4(d) requires an interpretation of the phrase "international agreements *related to* the protection of IP" (emphasis added) ⁽²⁴⁾. Furthermore,

the Member States which conform with these agreements following the process of regional integration"; See WTO Doc.-IP/N/4/EEC (29 Jan. 1996); cf. also 27 *International Review of Industrial Property and Copyright Law* (hereafter: IIC) (1996) 581.

(22) For a different opinion see ABBOTT, *Law and Policy of Regional Integration: The NAFTA and Western Hemispheric Integration in the World Trade Organization System* (Dordrecht: Nijhoff, 1995), p. 95. The author considers even the NAFTA Agreement to qualify for an exemption under Art. 4(d).

(23) WTO Doc.-IP/C/8 (6 Nov. 1996), p. 3.

(24) In its report on *Reformulated Gasoline*, the Appellate Body noted that all the participants and third participants in that appeal accepted the view that the words "relating to", in the context of the Art. XX(g) GATT 1994 phrase "relating to the conservation of exhaustible natural resources", *must* be interpreted as "primarily aimed at ..." (AB 1996-1 *United States - Reformulated Gasoline*, WT/DS2/AB/R (29 April 1996), section B. The AB notes that the panel and participants followed a decision of a pre-Uruguay GATT panel in the case of *Canada - Unprocessed Herring and Salmon*, BISD 35S/98). The AB did not examine this issue further, yet it added "that the phrase 'primarily aimed at' is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g)". The AB has thus made room for a different interpretation, acknowledging however that "related to" cannot be given a loose

such exemption is restricted to advantages, favours, privileges or immunities deriving from international agreements which entered into force prior to the entry into force of the WTO Agreement. Should the EC Member States wish to preserve the exemptions, they may not replace the EC or the EEA treaties by any other ones. Could it be that the entry into effect of the WTO has become the defining moment of the EC Treaty? Or is it rather to be deduced that the EC/ EEA treaties were not within the purview of the TRIPs drafters? If regional agreements could give rise to an exemption, it would not have made sense to restrict them only to agreements in force before the WTO. Such special treatment of Members who managed to organize early enough is not plausible. It has been maintained that existing and future agreements establishing Free Trade Areas and Customs Unions could be immunized from applying MFN treatment only to some *non*-TRIPs mandated IP measures affecting intra-regional adherents ⁽²⁵⁾. In my view, such an approach is not tenable ⁽²⁶⁾.

interpretation, lest the purpose and object of Article III:4 be subverted. Secondly, the fact that all participants have accepted that "related to" *must* be taken to mean "primarily aimed at" is an important indication regarding the appropriate meaning. Thirdly, an interpretation viewing a treaty as "relating to the protection of IP" only if it is "primarily aimed at" IP protection would seem to be the one flowing from the general rules of interpretation under Art. 31 Vienna Convention on the Law of Treaties. It is consistent with the words used and their context in light of the object and purpose of TRIPs.

(25) REICHMAN, *Universal Minimum Standards of Intellectual Property Protection under the TRIPs Component of the WTO Agreement*, 29 *The International Lawyer* (1995), 345, 349. This construction is supported by the wording of the Understanding on the Interpretation of Article XXIV, GATT 1994.

(26) Perhaps adopting this view, the US notified only Art. 1709(7) NAFTA "as being exempt from the MFN treatment obligations of the TRIPs Agreement". WTO-Doc./IP/N/4/USA/1 (29 Feb. 1996). Notification dated 21 Feb. 1996. Para 7 reads: "Subject to paragraphs 2 and 3, patents shall be available and patent rights enjoyable without discrimination as to the field of technology, the territory of the Party where the invention was made and whether products are imported or locally produced." This is incompatible with the wording of Art. 4(d); it is not some provisions that may be exempted, but rather all rights and advantages arising as such from the pertinent agreements. Art. 1709(7) has no independent status, and cannot on its own be considered an *agreement* related to IP protection. Mexico's notification is an attempt to combine both approaches, by first notifying "[t]he provisions of the NAFTA concerning trade-related aspects of IP rights" and immediately thereafter mentioning that "the above provisions were notified to

4. *The legal framework for EC patent protection.*

4.1. *The regional context.*

Two aspects of the TRIPs patent provisions render them a most suitable focal point of this study: the high level of standards and harmonization achieved within TRIPs coupled with the lack of harmonization of substantive patent law on the Community level.

Despite the clear impact of IP rights on commercial policy, free movement of goods and competition, IP is mentioned only once in the EC Treaty. Similarly to Article XX(d) GATT, Article 36 EC acknowledges the link between IP and trade and delimits the use that EC Member States may make of such rules. The ECJ interpreted its second part as making all national measures coming within the exception subject to a rule of proportionality ⁽²⁷⁾. Another pertinent provision, Article 222 EC, seems to imply that the Treaty guarantees IP rights granted by each Member State ⁽²⁸⁾. Such an interpretation would have made it impossible to review those rules with respect to the free movement of goods or with respect to rules on competition. However, the ECJ ruled that EC law does not interfere with the existence of IP rights, it merely limits their exercise to the extent necessary to attain other goals of the EC Treaty ⁽²⁹⁾. Apart from the rules related to the free movement of goods and services and to competition, basic principles of EC law such as the principle of non-discrimination apply to IP ⁽³⁰⁾.

4.2. *The international context.*

The EC Member States are all Paris Convention Members. Since they were parties thereto either before the EC Treaty came into effect

GATT/WTO together with all other provisions of NAFTA in document L/7176/Add.1" (WTO Doc./IP/N/4/MEX/1 (12 Feb. 1996)); neither approach is tenable.

(27) GORMLEY, *Prohibiting Restrictions on Trade within the EEC* (The Hague: North-Hollans, 1985), 124-126.

(28) Since the Treaty is not to affect national rules on property ownership.

(29) See e.g. Joined Cases 56 & 58/64, *Consten and Grundig v. EC Commission*, [1966] ECR 299.

(30) Cases C-92 and 326/92, *Phil Collins v. Imtrat Handelsgesellschaft mbH*, [1993] ECR I-5145.

or before their accession to the EC, Article 234 EC applies; according to the case law of the ECJ, this is insofar as the rights of non-member countries need to be safeguarded, but not in an intra-Community context to escape the rules laid down in the EC Treaty ⁽³¹⁾.

The EC and the Member States are jointly parties to TRIPs ⁽³²⁾. The EC alone is competent regarding the adoption of border measures against the importation of counterfeit goods. The Member States are not exclusively competent concerning the rules on enforcement of IP protection. By virtue of Article 228 EC, TRIPs is therefore binding both on the EC Institutions and on the Member States that are jointly responsible for its implementation, both in relation to non-members and in relation to the Community.

The Community Patent Convention (hereafter: CPC), signed at the Luxembourg Conference 1975 and amended by the 1989 Agreement relating to Community Patents, has not yet come into force. The rules regarding patents have therefore not yet been harmonized.

Another pertinent convention, concluded after the coming into effect of the EC, is the Munich Convention on the grant of the European Patent (hereafter: EPC) of 5 October 1973, to which all EC Member States (as well as Switzerland, Liechtenstein and Monaco) are parties. The EPC was originally intended just to decide whether a European patent should be granted, leaving all other issues to the national legislatures. However, a "maximal" approach was eventually adopted, and some substantive issues were included. Yet, the European patent is not a single, unitary patent, but a "bundle of national patents", subject to some special rules making the bundle different from its separate particles. The EPC does not substitute but only provides an alternative to the grant of patents through the national patent offices. Such grants are governed by the national laws of the EPC Members. Article 4(d) TRIPs does apply to the EPC. Therefore, any advantage, favour, privilege or immunity accorded by a Member deriving from it is exempt from the MFN

(31) Joined Cases C-241 & 268/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications (ITP) v. Commission*, [1995] ECR I-743 (the *Magill* case), para 84 of the judgment.

(32) Opinion 1/94, [1994] ECR I-5267.

obligation. Denmark and Italy notified the Council for TRIPs thereof ⁽³³⁾. These notifications exempt from MFN not only rights accorded by Denmark and Italy, but also those accorded by all Members of the European Patent Organization (which was established under the EPC).

5. EC law revisited under TRIPs: The interface with competition.

5.1. Exhaustion of rights.

The term "exhaustion of rights" means essentially that the patentee's right to control the exploitation of the patented product, which has been put on the market by him or with his consent, has come to an end. The highly debatable issue, whether and under what rationale the rights of a patentee should be considered exhausted, is best explained by comparing the different approaches taken by Japan, the US, and the EC.

5.1.1. Japanese patent law.

According to a decision given by the Tokyo High Court on 23 March 1995, a patent owner who placed his product on any market in the world may no longer stop parallel imports from there ⁽³⁴⁾. This reflects the doctrine of international exhaustion of rights ⁽³⁵⁾. The High Court reasoned that, as long as the proprietor of the patent offered and sold the patented product, the aim of the subject patent right has been attained and extinguished. The patent rightholder can enjoy his right by adding compensation for disclosure of his inven-

(33) on 28 Dec. 1995 and 31 Jan. 1996, respectively: WTO Doc.-IP/N/4/DNK/1 (29 Jan. 1996); WTO Doc./IP/N/4/ITA/1 (21 Feb. 1996).

(34) *Japauto Products Co. v. BBS Kraftfahrzeugtechnik AG* (The Aluminum Wheel Case), GRUR Int. 1995, 417; 27 IIC (1996) 550; cf. YAMAMOTO, *A reversal of fortune for patentees and parallel importers in Japan: The Aluminum Wheel Case*, 7 EIPR (1995), 341; BEIER, *Zur Zulässigkeit von Parallelimporten patentierter Erzeugnisse*, (1996) GRUR Int., 1.

(35) Prior to this decision, the Japanese position was that the holder of parallel imports could prevent the importation of products purchased from him, or from his licensee, in foreign countries. See YAMAMOTO, *ibid.*, 341.

tion to the price of the products. One such chance should offer sufficient protection. Unless international exhaustion follows the initial authorized sale, the safety of dealings in business would be damaged by the prevention of distribution of patented products. This would lead to the inevitable prevention and damage to the development of industry.

On 1 July 1997, the Japanese Supreme Court confirmed the international exhaustion of rights in principle, subject however to a qualification that exhaustion will not occur if the Japanese patent holder has forbidden patent holders in other States from exporting the patented goods to Japan, and that the goods have been marked accordingly ⁽³⁶⁾. This decision is less coherent; it is difficult to reconcile the reasoning leading to a doctrine of international exhaustion with the authorization of private parties to contract out of it.

5.1.2. *US patent law.*

US courts have developed the so-called "first-sale doctrine"; after a patent owner sells a patented product to a customer he is considered to have exhausted his rights with respect to any further disposition that may be made of the product ⁽³⁷⁾. Initially, the only limitations on customers' conduct recognized were restrictions needed to protect health, safety and product reliability. In 1977, however, the Supreme Court ruled that post-sale, territorial and customer restraint were not illegal *per se*, but should be made in each case subject to the rule of reason ⁽³⁸⁾. The reasoning rested on anti-trust law considerations. The case involved unpatented prod-

(36) IKEUCHI, *Urteil des japanischen Obersten Gerichtshofs: Parallelimport patentgeschützter Waren (Sog. BBS-Fall)*, 2 *Zeitschrift für japanisches Recht* (1997/4), 143.

(37) *Adams v. Burke*, 84 US (17 Wall) 453, at 456-457, 21 L.Ed. 700 (1873); STERN, *The Exhaustion of Patent Rights: A U.S. Commentary*, 2 EIPR (1980), 5 (Stern (1980)); for a recent exception to this rule see STERN, *The Unobserved Demise of the Exhaustion Doctrine in US Patent Law: Malinckrodt v. Medipart*, 12 EIPR (1993), 460 (Stern (1993)).

(38) *Continental T.V. v. GTE Sylvania Inc.*, 433 US 36 (1977); cf. HOLMES, *Intellectual Property and Antitrust Law* (Deerfield: Clark Boardman Callaghan, 1997) § 17.04, pp. 17-817-12.

ucts, yet it has been suggested that it might equally apply to patented products ⁽³⁹⁾.

At the same time, US law has recognized functionally equivalent limitations, subject to a rule of reason, on the scope of licences to manufacture and sell patented products ⁽⁴⁰⁾. The patentee is entitled to make the licence subject to any condition "the performance of which is reasonably within the reward which the patentee [as a patentee] is entitled to secure" ⁽⁴¹⁾. US courts, appreciating the procompetitive aspects of licensing, have allowed almost any limitation on the scope of a licence to manufacture a patented product, as long as it was not considered to be the result of a conspiracy or a cartel among competitors ⁽⁴²⁾.

The exhaustion rules do not apply to products manufactured or marketed abroad, not even when these activities are undertaken by the patentee or with his consent ⁽⁴³⁾. The purchaser of patented products from a foreign licensee, who makes and sells the products under a parallel patent abroad, may not import them into the US in violation of the rights of the US patentee or US exclusive licensee ⁽⁴⁴⁾. A sale abroad by the patentee or his subsidiary does not affect the rights of his US exclusive licensee ⁽⁴⁵⁾. A US assignee is entitled to prevent the importation of products sold abroad by the assignor ⁽⁴⁶⁾.

(39) ABA Antitrust Section, *Antitrust Law Developments* (3rd ed., 1992) p. 828; STERN (1980), *supra* note 37, p. 6.

(40) *United States v. General Electric Company*, 272 US 476 (1926); KOBAR, *Running the Gauntlet: Antitrust and Intellectual Property Pitfalls on the Two Sides of the Atlantic*, *Antitrust L.J.* 341, 345-347.

(41) *United States v. General Electric Company*, *ibid.*, 489-490.

(42) Cf. STERN (1993), *supra* note 37, 460.

(43) CHISUM, *Patents*, (1997) Vol. 5, para. 16.05[3]; STERN, *Parallel Imports into the United States*, *Patents, Trademarks and Anti-Trust*, 2 EIPR (1980), 285; HAWK, VAIRO, *International territorial restrictions through patents under United States law*, 8 *Swiss Review of International Law* (1980) 1, 12-13.

(44) *Griffin v. Keystone Mushroom Farm Inc.*, 453 F. Supp. 1283 (1978); ROSENBERG, *Patent Law Fundamentals* (2nd ed., 1997 Revision), para. 18.09.

(45) *Sanofi S.A. v. Med-Tech Veterinarian Products Inc.*, 220 USPQ 416 (1983); *Sanofi S.A. v. Med-Tech Veterinarian Products Inc.*, 222 USPQ 143 (1983).

(46) *Boesch v. Graeff*, 133 US 697, 702-703 (1890); *T.C. Weygandt Co. v. Van Emden*, 40 F. 2d 938 (1930).

5.1.3. EC law.

The ECJ has interpreted the Treaty so as to prevent IP owners from dividing the internal market on a territorial basis. According to the ECJ, Article 36 EC permits derogations from the principle of free movement provided they do not amount to arbitrary discrimination or a disguised restriction of trade between the Member States, and that they are "justified for the purpose of safeguarding rights which constitute the specific subject-matter of this property" (47).

To reconcile the requirements of the free movement of goods in the Common Market with IP protection, the ECJ has drawn a distinction between the "existence" of the rights and their "exercise", which required the development of the concept of the "specific subject-matter" of each IP right (48). The ECJ ruled that the "specific subject-matter" of patents is "the guarantee that the patentee, to reward the creative effort of the inventor, has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time, either directly or by the grant of licences to third parties, as well as the right to oppose infringements" (49).

A whole line of cases followed, reducing the "reward" content and focusing only on the question whether the goods were first placed in the market with the patentee's "consent". A striking example is the decision that a patentee who put a drug on sale in the Italian market, where no protection for patents for drugs was then

(47) Case 78/70, *Deutsche Grammophon GmbH v. Metro*, [1971] ECR 487, 499-500 (copyright); Case 192/73, *van Zuylen Frères v. Hag AG*, [1974] ECR 731, 743-744 (trademarks); Case 15/74, *Centrafarm BV v. Sterling Drug Inc.*, [1974] ECR 1147, 1162 (patents).

(48) For an analysis with respect to each IP right see Govaere, *The Use and Abuse of Intellectual Property Rights in EC Law*, (1996) GRUR Int., 79-100.

(49) *Centrafarm v. Sterling*, *supra* note 47, 1162; Community exhaustion of patent rights has been first suggested by KOCH, FROSCHMAIER, *Patentgesetze und Territorialitätsprinzip in Gemeinsamen Markt*, (1965) GRUR Int., 121, in order to solve the conflict between the partitioning of the market by parallel patents and the Community interest in an integrated market; for a critical analysis see R. CASATI, *The 'Exhaustion' of Industrial Property Rights in the EEC: Exclusive Manufacturing and Sales Provisions in Patent and Know-How Licensing Agreements*, 17 Col. J. Trans. L. (1978), 313.

available, was unable to prevent its importation into the Netherlands⁽⁵⁰⁾. The ECJ reasoned that, as soon as the patentee decided to place his product in a market where no protection existed "he must then accept the consequences of his choice as regards the free movement of the product within the Common Market". This reasoning has been further extended to a patentee who had placed his drug on the market in Spain and Portugal, long before they acceded to the EC⁽⁵¹⁾. In this case he could not even have been deemed to make a choice. His deliberate placing of the goods on the market was considered sufficient to have "exhausted" his rights regarding imports from Spain and Portugal into the other Member States. These decisions are a far cry from the "reward" rationale. Absent a patent, no right could have been "exhausted"⁽⁵²⁾.

5.1.4. *The economic rationale.*

The "exhaustion of rights" is central to the interaction between patent laws and rules regarding competition. The long run aims of both legal regimes are the same, i.e. better allocation of scarce resources in the best interests of the public at large and market motivation, the one by prohibiting artificial barriers to the entry of new products to the market, and the other by promoting the invention of new products and new production methods that customers are willing to pay for⁽⁵³⁾. The principal regulator is, in both cases, the pricing system. Patent law, like antitrust law, does not support growth for growth's sake. Research and development should not be promoted by a subsidy supporting the overproduction of invention.

"Exhaustion of rights" should be analysed against this background. Even if the rules of patent protection were similar all over the world, it is not clear that international exhaustion would have

(50) Case 187/80, *Merck & Co. v. Stephar BV*, [1981] ECR 2063.

(51) Joined Cases C-267/95 and C-268/95, *Merck & Co. Inc. v. Primecrown Ltd; Beecham Group plc v. Europharm of Worthing Ltd.*, [1996] ECR I-6285.

(52) BENYAMINI, *Patent Infringement in the European Community* (Weinheim: VCH, 1993), 298-300; GOVAERE, *op. cit.*, *supra* note 48, 164-168.

(53) BOWMAN, *Patent and Antitrust Law: A Legal and Economic Appraisal* (Chicago: Univ. of Chicago, 1973), 1-15.

been justified. There are many other factors whereby markets differ widely, such as the specific needs of each market, differences in the cost of living, the price of production and marketing, and State regulation affecting prices or other marketing conditions, as is often the case with pharmaceuticals. Forcing a patentee to make a single choice under such extreme conditions may undermine not only the basic tenets of patent law, but also those of international trade law. From a patent theory point of view, it can be shown that imposing conditions of use, including the partition of the market into singular isolated territories, can be used to achieve more efficient production or distribution, and thus lower rather than raise the price of the patented products ⁽⁵⁴⁾.

5.1.5. *Exhaustion under TRIPs.*

Article 6 TRIPs sets a very peculiar rule, that "[f]or the purposes of dispute settlement under this Agreement ... nothing in this Agreement shall be used to address the issue of exhaustion of intellectual property rights". The rule is made subject to the provisions of Articles 3 (NT) and 4 (MFN). Some authors have interpreted it as a choice by the TRIPs drafters to leave it to each Member to make his own choice ⁽⁵⁵⁾. This interpretation poses serious difficulties. The wording of Article 6 does not exclude the issue of exhaustion altogether from the scope of TRIPs. The better interpretation is to view this provision as procedural, the substantive issue to be decided according to the substantive rules regarding each kind of IP right in view of its subject-matter and purpose ⁽⁵⁶⁾. In the case of trademarks, where the subject-matter and purpose of the right is to ensure the origin of the goods, exhaustion may more readily be

(54) BOWMAN, *ibid.*, 64-119.

(55) WORTHY, *Intellectual Property Protection After GATT*, 5 EIPR (1994), 195; SOLTYSINSKI, *International Exhaustion of Intellectual Property Rights under the TRIPs, the EC law and the Europe Agreements*, (1996) GRUR Int., 316, 319; REINBOHE, HOWARD, *supra* note 12, 159; BRONCKERS, *supra* note 6, 1265.

(56) STRAUS, *Implications of the TRIPs Agreement in the Field of Patent Law*; ULLRICH, *Technology Protection According to TRIPs: Principles and Problems*; both in BEIER and SCHRICKE (Eds.), *From GATT to TRIPs*, (Weinheim: VCH, 1996) at pp. 191 and 357, 385 resp.

accorded than in the case of patents or copyright ⁽⁵⁷⁾. Indeed, the issue of exhaustion could hardly be settled for all rights *en bloc* in one general provision.

Article 27(1) provides that patent rights shall be enjoyable without discrimination as to the place of invention and as to whether the products are imported or locally produced. Article 28(1) enumerates the exclusive rights of the patent owner to prevent third parties, not having his consent, from making, using, offering for sale, selling, or *importing* the patented product. A footnote to the word "importing" reiterates that this right, like all other rights conferred under this Agreement in respect of the use, sale, importation or other distribution of goods, is subject to the provisions of Article 6, which, it will be remembered, relates only to the dispute settlement under this Agreement! It is therefore submitted that, regarding patents, the substantive rights provided in Articles 27 and 28 mandate that international exhaustion should be excluded.

This conclusion befits the object and purpose of TRIPs as a whole. The protection of IP is not the sole objective of TRIPs ⁽⁵⁸⁾. According to Article 7 TRIPs (Objectives) it should serve "the promotion of technological innovation" and "the transfer and dissemination of technology ... in a manner conducive to social and economic welfare". The Preamble to TRIPs recognizes the special needs of the least-developed Members "to create a sound and viable technological base". Introducing international exhaustion would yield the result that no patentee in his right mind would choose to place a product on the market of a developing, let alone a least developed country ⁽⁵⁹⁾. Neither would he agree to have his products manufactured by licensees there. His best strategy would be to register the patent, and then refrain from importing it into that

(57) Cf. BEIER, *Zur Zulässigkeit von Parallelimporten patentierter Erzeugnisse*, *supra* note 34, 5.

(58) The enthusiastic support of international exhaustion by SOLTYSINSKI, *supra* note 55, seems to overlook this aspect; international exhaustion is advocated also, at least as a goal to strive for, by ULLRICH, *op. cit.*, *supra* note 10, 193-196.

(59) Cf. STRAUS, *supra* note 56, 195; ADELMAN/ BOLDIA, *Prospects and Limits to the Patent Provision in the TRIPs Agreement: The Case of India*, 29 *Vanderbilt Journal of Transnational Law* (1996) 507, 532.

territory, and from consenting to any use that may be made of it there. True, the patent may be put to use without his authorization by means of a compulsory licence ⁽⁶⁰⁾. But such use will be non-assignable, it will be predominantly for the supply of the domestic market of the Member authorizing it, and the patentee will be entitled to adequate remuneration, taking into account the economic value of the authorization. International exhaustion of rights would thus reduce technology transfer.

Returning to the EC rules on exhaustion, even if the EC had in fact been left free to maintain its exhaustion rules, the Member States would still have to comply with the MFN principle. This conclusion is based on the plausible interpretation that the EC Treaty may not be excluded from the MFN principle ⁽⁶¹⁾. It might be argued that applying the TRIPs MFN principle would not help to extend the EC rules regarding exhaustion to other WTO Members, since the discrimination is based on the origin of the goods rather than the nationality of the patentee or that of the parallel importer. This argument should be rejected. Even though the decisions of the ECJ favour parallel importers who import into one EC Member State patented goods manufactured in other EC Member States, this discrimination is by no means indifferent to the nationality of the rightholder. Since the right of establishment in the EC and the right to provide services there are granted on a non-discriminatory basis only to EC nationals, the EC rules of exhaustion favour EC nationals.

In the context of exhaustion, the MFN principle operates to lower the standards of IP protection, as it helps strengthen the rights of parallel importers at the expense of the patent owners. Whereas a Community exhaustion of rights could be developed by the ECJ, an international principle of exhaustion of rights regarding patents is not within its competence and would have to be upheld by the Member States. The substantive TRIPs rules regarding patents make it difficult to concede that the EC has remained free to apply its exhaustion prin-

(60) Cf. Art. 31 TRIPs regarding use without authorization of the right holder, see *infra* section 5.2.3.

(61) Cf. section 3.2 *supra*.

ciples even if it does so on a non-discriminatory basis. A revision of EC exhaustion rules is required, that would strengthen patent rights at the expense of the principle of free movement.

5.2. *Compulsory licences.*

5.2.1. *General.*

Most States curb the rights of patentees to monopolize the market for the patented product in the following cases: where the patentee is considered to have abused his exclusive rights; where there are two patents, the more recent of which cannot be exploited without infringing the first; where such a licence is required in the public interest ⁽⁶²⁾. Third parties are then granted a compulsory, or non-voluntary, licence, allowing them to compete directly with the patentee in the domestic market. The granting of a compulsory licence on an exclusive basis amounts in fact to expropriation. Rules on compulsory licences exist in the Paris Convention, in TRIPs and in almost all domestic laws, the US being a very distinct exception.

5.2.2. *The rules on compulsory licences under EC Law.*

(a) *The absence of harmonization.* The Member State rules regarding compulsory licences have not been harmonized. Even the CPC would not effect complete harmonization. A unitary Community patent should have logically implied that compulsory licences be granted by a single European authority on the basis of identical conditions, but the Member States could not agree on the rules ⁽⁶³⁾. The CPC introduced some minimum provisions ⁽⁶⁴⁾. It prohibits the grant of a compulsory licence in respect of a Community patent

(62) PFANNER, *Die Zwangslizenzierung von Patenten: Überblick und neuere Entwicklungen*, (1985) GRUR Int., 357; WIPO Geneva, WO/INF/29 (Sept. 1988), "Existence, scope and form of generally accepted and applied standards/ norms for the protection of intellectual property", in BEIER and SCHRICKER (1989), *supra* note 4, Annex III, pp. 213, 224-225.

(63) DEMARET, *Industrial property rights, compulsory licences and the free movement of goods under Community law*, 18 IIC (1987), 161, 165 et seq.

(64) Art. 46(2) CPC.

(Article 47), or in respect of national patents of the Contracting States (Article 82) on the ground of lack or insufficiency of exploitation, if the product covered by the patent, which is manufactured in a Contracting State, is put on the market in the territory of any other Contracting State, for which such a licence has been requested, in sufficient quantity to satisfy the needs of the other Contracting State. This prohibition does not apply to compulsory licences granted in the public interest.

The ECJ has elaborated rules in the context of the freedom of movement of goods and competition, which go even further.

(b) *The free movement of goods context.* The case law emphasizes once again the clash between reasoning under patent law and under EC law. In the first relevant case the ECJ dealt with the import and marketing in one Member State of a product manufactured in another Member State under a compulsory licence against the will of the parallel patent holder in both Member States ⁽⁶⁵⁾. The ECJ held that the patent holder was entitled to bar the imports, since it could not be deemed to have consented to the activities of the grantee of the compulsory licence. From a "consent" theory point of view this result is coherent. It is problematic however from both a patent law and a competition law standpoint. Under *Merck* patentees behaving in a competitive manner are penalized by having their rights exhausted ⁽⁶⁶⁾, whereas under *Pharmon*, if they behave in an anticompetitive manner and do not exploit their rights at all they are rewarded ⁽⁶⁷⁾.

The next cases dealt with the right of Member States to grant compulsory licences for insufficient working of the patent in the national territory even though the patent holder met the needs of the market by importing the patented product from other Member States ⁽⁶⁸⁾. The ECJ held that such national laws may hinder intra-Community trade and thus conflict with the prohibition on

(65) Case 19/84, *Pharmon BV v. Hoechst AG*, [1985] ECR 2281.

(66) *Supra* note 50.

(67) Cf. GOVARE, *op. cit.*, *supra* note 48, 165.

(68) Cases C-235/89, *Commission v. Italy*, [1992] ECR I-777; C-30/90, *Commission v. UK*, [1992] ECR I-829.

measures having equivalent effect to quantitative restrictions. They could not be justified under Article 36 since their object was not to protect industrial property but rather to limit its reach. Although it was up to the national legislatures to determine the rules regarding IP protection, Article 222 EC could not be interpreted as reserving to the national legislature, in respect of industrial and commercial property, the power to adopt measures adversely affecting the freedom of movement of goods within the internal market.

It has been submitted that the ECJ chose this line of reasoning in order to maintain its case law curtailing the “exercise” of rights yet leaving their “existence” untouched ⁽⁶⁹⁾. The decisions demonstrate the difficulty in reconciling the objectives of EC law with those of a modern patent system. From a patent law point of view, it would have been more coherent to state that derogations from the principle of free movement may, in principle, be applied to justify all national measures which enhance or weaken IP protection, as the case may be, but that the justification has to show that the measure is needed to safeguard the essential function of that right. In the case of patents this is the right to grant temporary exclusive rights to the patentee, that will provide him with the possibility of obtaining a reward; to stimulate innovation and invention; and to let society be made aware of the invention rather than having it kept secret ⁽⁷⁰⁾. The ECJ did not consider a direct review of the very existence of the national measures regarding IP rights as going beyond its competence or beyond what could be read into Articles 30-36. Had the ECJ followed this route, the issue would have been dealt with squarely, unhindered by the very confusing and unhelpful “existence/ exercise” dichotomy. One may speculate why the ECJ refrained from doing so. One reason might be the apprehension that such an analysis could lead in future cases to results that would conflict with EC single market integration — which has so far overshadowed EC competition law ⁽⁷¹⁾. One might argue that even market integration

(69) GOVAERE, *op. cit.*, *supra* note 48, 172.

(70) GOVAERE, *op. cit.*, *supra* note 48, 167, 172-174; DEMARET, *supra* note 63, 181.

(71) Cf. e.g. WHISH, *Competition Law* (3rd ed., Butterworths, 1993), 29.

should be made subject to the rules of competition. Such an interpretation would be in keeping with the principle of "an open market with free competition" (Article 3a EC), as well as with the objective of conducting "a system ensuring that competition in the internal market is not distorted" (Article 3(g)) ⁽⁷²⁾. This approach has not been whole-heartedly endorsed either by EC institutions or by the ECJ. Furthermore, the Maastricht revision of the EC Treaty added as one more objective "the strengthening of the competitiveness of Community industry" (Article 3(l)). This objective tends to be diametrically opposed to the ideal of a common market with undistorted competition ⁽⁷³⁾. However, in the above cases a different line of reasoning would not have mattered, as the ECJ decisions were fully in line with the objective of ensuring that competition would not be distorted by protectionist laws that could only contribute to an inefficient allocation of resources in the internal market.

Two further cases dealt with a special kind of compulsory licences, that is "licences of right" ⁽⁷⁴⁾. In *Allen and Hanburys v. Generics* the question arose whether a patentee could rely on UK law regarding licences of right to prevent a third party from importing the products from another Member State, Italy, in which the products were marketed without his consent since no patents were available for pharmaceuticals at that time ⁽⁷⁵⁾. The ECJ shifted from the "consent" theory, under which such imports could have been barred, and instead declared that the specific subject-matter of patents under licences of

(72) MESTMÄCKER, *On the legitimacy of European Law*, 58 *RabelsZ* (1994) 615, 632-635.

(73) MESTMÄCKER, *Auf dem Wege zu einer Ordnungspolitik für Europa*, in MESTMÄCKER, MOELLER, SCHWARTZ (Eds.), *Eine Ordnungspolitik für Europa: Festschrift von der Groeben*, (Nomos, 1987), pp. 27-34; IMMENGA, *Wettbewerbspolitik contra Industriepolitik nach Maastricht*, in LUEDER GERKEN (Ed.), *Europa 2000 - Perspektive wohin?* (Freiburg: Haufe, 1993), pp. 147-165.

(74) In the UK, patentees secure reduction of renewal fees if they have the patent endorsed "licences of right", in which case they must license, in principle, all applicants on terms which, unless agreed upon, are fixed by the patent comptroller. Importers could however be denied licences of right. UK Patents Act 1977, sections 46-50; CORNISH, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (3rd ed., Sweet & Maxwell, 1996), para. 4-25.

(75) Case 434/85, *Allen and Hanburys Ltd. v. Generics (UK) Ltd.*, [1988] ECR 1245.

right has been appreciably altered and constituted merely the right to get a fair return ⁽⁷⁶⁾. The UK law provisions were thus declared as amounting to arbitrary discrimination in the sense of Article 36, and therefore violating EC law. The pro- or anti-competitive effects of this judgment can hardly be assessed without considering the question whether a system of "licences of right" is procompetitive, and whether the Patent Comptroller can replace the market in deciding the "fair return" that the patent holder should obtain for his invention. Such an evaluation is outside the scope of this study. However, it is noteworthy that in this specific context the ECJ chose to resort to the "reward" theory, probably because it served to enhance the free movement of goods, whereas the "consent" theory would have effected market partitioning.

In *Generics v. Kline* the ECJ ruled on the compatibility with EC law of national provisions denying a licence of right to import from non-EC Member States when the patentee worked the patent by manufacture in the UK, yet requiring it to grant a licence of right to import from non-EC Member States if the patentee worked the patent by importing it from other EC Member States ⁽⁷⁷⁾. The ECJ declared the UK practice discriminatory. It reiterated its "consent" theory, concluding that the difference in treatment could only be explained by the desire to favour local production, which had nothing to do with the specific requirements of industrial and commercial property. Such discrimination could not be justified under Article 36. This case served again enhanced competition and better allocation of resources in the internal market.

(c) *The competition context.* The EC Treaty rules on competition are fully applicable to IP rights ⁽⁷⁸⁾. However, the "normal use", or use that does not go beyond the "essential function", of IP rights

(76) GOVAERE, *op. cit.*, *supra* note 48, 175-176.

(77) Case C-191/90, *Generics (UK) Ltd. and Harris Pharmaceuticals Ltd. v. Smith Kline and French Laboratories Ltd.*, [1992] ECR I-5335.

(78) ULLRICH, *Die Anwendung der Wettbewerbsregeln auf die Verwertung von Schutzrechten und sonst geschützten Kenntnissen*, in IMMENGA, MESTMÄCKER, *EG-Wettbewerbsrecht Kommentar* (Munich: Beck, 1997), vol. 1, chapt. VIII.B, pp. 1203 et seq.

does not itself violate these rules ⁽⁷⁹⁾. Article 85 EC applies to agreements regarding licences, concerted practices etc. Article 86 applies to unilateral acts, insofar as the right holder holds a dominant position, abuses it, and intra-community trade is thereby affected. The ECJ has not defined the "normal use" or "essence" of IP rights. Neither has it clarified what behaviour would be considered "abusive". These issues have been developed on a case-by-case basis. The "essence" of patents is not equivalent to their "subject-matter and purpose" under Articles 30 to 36, since otherwise as soon as a potentially anticompetitive behaviour were cleared under the rules regarding the freedom of movement of goods, it would have also been cleared under Article 85. Such is not the case ⁽⁸⁰⁾.

The case most pertinent to compulsory licences is the so-called "*Magill* case" ⁽⁸¹⁾. The Commission, the CFI and the ECJ all held that the exercise of an exclusive copyright by the proprietor may, in exceptional cases, constitute an abuse. The ECJ considered this case exceptional, since the companies, by relying on their copyright, prevented the appearance of a new product which they did not offer and for which there was a potential consumer demand ⁽⁸²⁾. The ECJ also endorsed the powers of the Commission to impose compulsory licences, albeit subject to the payment of reasonable royalties ⁽⁸³⁾. The decision amounts to depriving the copyright of its substantial contents. It is hard to reconcile with a previous judgment in the *Volvo* case, where the ECJ ruled, with respect to industrial designs, that "an obligation imposed upon the proprietor of a protected design to grant third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his

(79) Case 24/67, *Parke, Davis v. Centrafarm*, [1968] ECR 55.

(80) Cf. the Opinion of A.G. GULMANN in *Magill*, *supra*, note 31, 755-764.

(81) *Supra* note 31.

(82) *Ibid.*, para. 54 of the judgment. A.G. Gulmann objected to this argument, as he opined that the conduct of an IP rightholder should not be considered abusive if he refuses a licence to a company that would then produce a competing product (paras. 96-98). The ECJ has not adopted this distinction.

(83) See Art. 3 of Regulation 17/62, O.J. L Spec. Ed. 1962, 87.

exclusive right" ⁽⁸⁴⁾. Since the *Magill* case relates to copyright, note will only be made regarding its possible effect on patents. Would a patent rightholder be considered to abuse his right by preventing an infringement by a third party claiming that it needs to use his protected invention or technology to create a new product? ⁽⁸⁵⁾. Although one would hardly expect the answer to be positive, such a result may follow from the *Magill* decision.

5.2.3. *The rules for compulsory licences under TRIPs.*

Article 31 TRIPs governs this issue referring to it as "use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties". When read on its own, Article 31 seems to sanction the issuing of compulsory licences by Members as soon as their law allows for such, provided only that the conditions enumerated in that Article are fulfilled. Those include: the obligation to assess each case on its individual merits (31(a)), thus prohibiting a general rule allowing for compulsory licences covering a range of patents or a whole field of use; that the authorization of the rightholder be first sought, except in cases of extreme emergency or cases of public non-commercial use, where the rightholder may be notified promptly although not necessarily in advance (31(b)); the scope and duration of such use must be limited to the purpose for which it is authorized; the licence must be non-exclusive (31(d)); it must be non-assignable, except with that part of the enterprise or goodwill which enjoys such use 31(e)); it must be authorized predominantly for the supply of the domestic market of the authorizing Member, a condition rightly criticized for being "a fragile compromise" (31(f)) ⁽⁸⁶⁾; the authorization must be liable to termination if the circumstances leading to the grant cease to exist and are unlikely to recur 31(g)); adequate remuneration must be paid, taking into account the eco-

(84) Case 238/87, *Volvo v. Veng*, [1988] ECR 6211 (para. 8), criticized by GOVAERE, *op. cit.*, *supra* note 48, 147-150, 253-255.

(85) Cf. GOVAERE, *op. cit.*, *supra* note 48, para 5.62, 147.

(86) COTTIER, *supra* note 15, 408.

conomic value of the authorization (31(h)) ⁽⁸⁷⁾; decisions must be subject to judicial review or other independent review (31(i)); decisions regarding remuneration must likely be subject to similar review (31(j)); special rules apply to the case of a patent which cannot be exploited without infringing another patent (31(l)).

Article 31(k) provides a special exemption from the requirement to seek authorization from the right holder (31(b)) and from the requirement to restrict production predominantly for the domestic market (31(f)), if the compulsory licence has been issued to remedy an anticompetitive practice. Such anticompetitive behaviour may be taken into account when calculating the amount of remuneration to be paid to the rightholder.

Another pertinent provision is Article 5A Paris Convention ⁽⁸⁸⁾. Article 8(2) TRIPs sanctions measures that may be needed to prevent the abuse of IP rights by rightholders or resort to practices which unreasonably restrict trade or adversely affect the transfer of technology. Such measures must be consistent with TRIPs. Article 5A(4) Paris Convention provides that, where the ground is failure to work or insufficient working, a compulsory licence may not be applied for before the expiration of four years from the date of filing of the patent application or three years from the date of its grant, whichever comes last. The licence must be refused if the patentee justifies his inaction by legitimate reasons.

A memorandum prepared by the WIPO International Bureau advocates that, since the detailed provisions regarding compulsory licences included in TRIPs and in the Paris Convention, respectively,

(87) The Industry GATT Proposal, Basic Framework of GATT Provisions on Intellectual Property - Statement of Views of the European, Japanese and United States Business Communities (June, 1988), in BEIER and SCHRICKE (1989), *supra* note 4, Annex III, pp. 357, 371, Art. III.A.8 requires full compensation; The Uruguay Draft Final Act, Dec. 1990 Revision refers to "fair and equitable" remuneration. See T.P. STEWART (Ed.) *The GATT Uruguay Round: A Negotiating History (1986-1992)* (Deventer: Kluwer, 1993), vol. III: Documents, 260, 275.

(88) Art. 2 TRIPs obliges Members to comply with Arts. 1-12 Paris Convention (1967) in respect of parts II, III, and IV TRIPs. Art. 5A(2) reads: "Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work".

are sometimes similar but sometimes deal with different matters, States should incorporate the conditions of both treaties ⁽⁸⁹⁾. TRIPs has also caused changes in the Paris Convention rules. Article 5A Paris Convention brings as the only example of abuse of rights the patentee's failure to work the patent in the domestic market, yet it is exactly this ground that has been excluded by TRIPs. This follows from Articles 27(1) and 28(1) TRIPs. According to Article 27(1) patents shall be available and *patent rights enjoyable* without discrimination as to whether products are imported or locally produced. Article 28 refers to "importing" as one of the exclusive rights that a patent confers on its owner. Since according to Article 5A Paris Convention compulsory licences may only be granted to prevent the abuse which might result from the exercise of the exclusive rights conferred by the patent, failure to work can no longer provide a justified ground ⁽⁹⁰⁾. Furthermore, whereas the Uruguay Round Final Act, December 1990 Revision, authorized Members to grant compulsory licences on grounds of failure to work, or insufficiency of working the patent four years after the date of filing of the patent application, such authorization was omitted from the final text ⁽⁹¹⁾.

The incorporation of the provisions of both treaties raises further problems. Are Members only permitted to issue licences to remedy abuses? Are they permitted to issue them whenever their national laws make it possible? Or is there another answer? The first interpretation finds support in legal literature ⁽⁹²⁾. It raises however the difficulty that the conditions mentioned in 31(b), 31(f) and 31(k) are thereby made redundant. True, Article 31(k) relates to

(89) "Implications of the TRIPs Agreement on Treaties administered by WIPO", 2 *Monthly Review of the WIPO* (1996) 164, 182.

(90) In the EC such a result would also follow from the combination of the TRIPs MFN principle with the ECJ decisions, that a rule authorizing the grant of a compulsory licence for non-working, where the patentee would have chosen to provide the needs of the domestic market through importation from another MS, is incompatible with the freedom of movement of goods within the EC: Cases 235/89, *Commission v. Italy*, [1992] ECR I-777; C-30/90, *Commission v. UK*, [1992] ECR I-829.

(91) See the 1990 Draft in STEWART, *op. cit.*, *supra* note 87, vol. III: Documents, 276.

(92) See e.g. STRAUS, *supra* note 56, p. 204 (186).

anticompetitive practices, which raises the question of the relation between patent abuse and anticompetitive practices. It has been suggested that the TRIPs "abuse" should not be equated with the Article 86 EEC "abuse" under competition law, but rather with the US law "patent misuse" ⁽⁹³⁾. This analogy may not help. Historically speaking, the US patent misuse doctrine has indeed been applied to conduct not rising to the level of an antitrust violation. This changed in the 1980s, with US courts applying antitrust standards to decide whether a patent owner has misused his patent ⁽⁹⁴⁾.

The second interpretation, namely that Members are permitted to issue compulsory licences whenever their national laws make it possible, is likewise problematic. Article 31 does not require that the domestic laws regarding compulsory licences "do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner", as does Article 30 providing for other exceptions to the exclusive rights conferred by a patentee. Neither does Article 31 require consistency with other TRIPs provisions, as does Article 40 regarding the control of anticompetitive practices in contractual licences. Yet, it is hard to imagine that the NT and MFN principles, the objectives (Article 7) and principles (Article 8) of TRIPs, as well as the rules included in Article 27, regarding the enjoyment of patent rights, and in Article 28, regarding the rights conferred, could be ignored. Article 31 must be read in context.

A starting point for the contextual analysis is Article 1(1), obliging Members to give effect to TRIPs provisions. From the permission to implement more extensive protection than required by TRIPs it may be inferred that Members are not free to implement rules according less protection. Article 7 (objectives) states that the protection and enforcement of IP rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology. Article 8 (principles) relates to mea-

(93) HEINEMANN, *Antitrust Law of Intellectual Property in the TRIPs Agreement of the World Trade Organization*, in BEIER and SCHRICKER (Eds.), *op. cit.*, *supra* note 56, p. 239, at p. 243.

(94) ABA Antitrust Section, *op. cit.*, *supra* note 39, pp. 814-816.

asures needed to protect public interests. Article 31 should not be read as an overriding provision that absolves States from implementing the rules protecting patent rightholders. Therefore, the national laws should only allow the use of patents without authorization of the rightholder insofar as such a licence is required to prevent the abuse which might result from the exercise of the exclusive rights conferred by the patent (Article 5A(2) Paris Convention), or insofar as is needed to protect public health and nutrition, and to promote the public interest in sectors of vital importance to socio-economic and technological development (Article 8(1)), provided that such use is consistent with TRIPs (Articles 8(1) and 8(2)) ⁽⁹⁵⁾. This result is particularly plausible as it fits the categories of compulsory licences existing before TRIPs.

Regarding Article 8, it is to be wondered that in provisions that refer to exceptions from the general rule, those exceptions are required to be consistent with the TRIPs provisions. The most plausible interpretation would be to view the requirement of conformity as an indication that the system of IP protection as such must be maintained, and the provision just allows the prevention of abuse within that system ⁽⁹⁶⁾.

Neither the Paris Convention nor TRIPs define what is meant by the "abuse" which might result from the exercise of the exclusive rights conferred by the patent. In order to understand this concept, all incidences of "abuse" as well as other references to antitrust law made in TRIPs should be considered. Those are in the Preamble, Article 8(2), Article 31 and Article 40. The Preamble stresses that IP rights do not serve as barriers to "legitimate trade". Article 8(2) TRIPs sanctions measures, consistent with TRIPs, needed to prevent the abuse of IP rights by rightholders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology. Article 31(c) and (k) address the scope and

(95) The German Federal Supreme Court (BGH) ruled that the patentee's abuse of his exclusive rights in not a precondition to the granting of a licence in the public interest: cf. *Polyferon*, (1966) GRUR Int, 190, 192. Indeed if that were the case, the provision regarding the public interest would have been redundant, since Art. 5A of the Paris Convention already provides for the case of abuse.

(96) Cf. HEINEMANN, *supra* note 93, 242-243.

duration of compulsory licences, yet add nothing to our understanding of the meaning of the anticompetitive behaviour which may serve as the ground for obtaining such a licence. Finally, Article 40, which deals with the control of anticompetitive practices in contractual licences, just declares that the Members agree that some licensing practices or conditions pertaining to IP rights which restrain competition may adversely affect trade ⁽⁹⁷⁾.

The correct interpretation of TRIPs thus involves the question whether its provisions call for a harmonized interpretation of the term "abuse". Article 31 is silent on this issue. Recent legal literature is absorbed with the interface between IP protection and competition law ⁽⁹⁸⁾. The major legal systems of developed countries still differ substantially in their approach to these matters ⁽⁹⁹⁾. The question whether there is a genuine need for a single interpretation of the TRIPs competition rules, or whether it should be left to each Member to decide its own competition policy, is beyond the scope of this article ⁽¹⁰⁰⁾. However, one way of answering the question would be to check whether e.g. the different rules developed in the US and the EC both fit the requirements of TRIPs.

5.2.4. *The effect of TRIPs on the EC rules regarding compulsory licences.*

Under US patent law, the right of a patentee to exclude others

(97) HEINEMANN, *supra* note 93, 246-247.

(98) ULLRICH, *op. cit.*, *supra* note 10; FIKENTSCHER, *Historical origins and opportunities for development of an international competition law in the TRIPs Agreement of the World Trade Organization (WTO) and beyond*, in BEIER and SCHRICKER, *op. cit.*, *supra* note 56, p. 226; Heinemann, *supra* note 93; FOX, *Trade, competition, and intellectual property - TRIPs and its antitrust counterparts*, 29 *Vanderbilt Journal of Transnational Law* (1996) 481; IMMENGA, *Rechtsregeln für eine internationale Wettbewerbsordnung*, in IMMENGA, Möschel, Reuter (Eds.), *Festschrift Mestmäcker*, (Baden Baden: Nomos, 1996), 593, 604.

(99) ULLRICH, *supra* note 78, paras. 17-37; KOBAK, *Running the gauntlet: Antitrust and intellectual property pitfalls on the two sides of the Atlantic*, 64 *Antitrust L.J.* (1995/6), 341; FOX, *supra* note 98.

(100) Cf. the different approach of FIKENTSCHER, IMMENGA, *Draft International Antitrust Code* (1995) and IMMENGA in Festschrift MESTMÄCKER, *supra* note 98, with FOX, *supra* note 98.

from making, using, or selling the patented product or process is considered the essence of a patentee's right ⁽¹⁰¹⁾. A refusal to use or license a patent is no basis for an antitrust claim ⁽¹⁰²⁾. He may do so without question of motive, even where he has monopoly power in a relevant market ⁽¹⁰³⁾. In the EC, on the other hand, refusal to license, or refusal to provide the needs of the market, may be considered an abuse ⁽¹⁰⁴⁾. From the wording of Article 31 it is clear that TRIPs endorses the approach of the EC, i.e. that there is room to grant compulsory licences where the patentee abuses his rights. The US approach would render these TRIPs rules meaningless. There is no need however for US law to harmonize its rules in this vein, since TRIPs allows its Members to adopt measures that provide for more extensive protection than that required thereunder, provided that such protection does not contravene its provisions (Article I(1)). In this case this condition is fulfilled. The compulsory licences issue thus proves that there is no need for harmonization across the board. No further conclusions may be drawn.

Whereas the *Magill* decision may, from the TRIPs point of view, remain in effect, the "Chinese" wall that the ECJ has helped to build around the EC should tumble. Patentees may go on barring the entry of imports from countries where the patented products are manufactured under compulsory licences, regardless of whether the manufacture has taken place in a Member State or in a third State. However, the application of the TRIPs MFN principle would mean that patentees should be allowed to provide for market needs not only when the patented goods are imported from other Member States, but also from other WTO Members ⁽¹⁰⁵⁾. The ECJ has not yet

(101) *ABA Antitrust Section*, *supra* note 39, 818-819.

(102) *Standard Oil v. US*, 283 US 163, 179 (1931); *US v. United Shoe Mach. Corp.*, 247 US 32, 57-58 (1918); *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 US 405, 426-430 (1908); *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 US 176 (1980), 215 (especially note 21).

(103) *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (1981).

(104) Cf. The *Magill* case, *supra* note 31.

(105) An argument that such discrimination is based on the origin of the goods rather than the nationality of the rightholders should be rejected. Discrimination on the basis of origin translates into discrimination between exporters from EC Member States and exporters from other WTO Members. Cf. section 5.1.5 above.

ruled on such problems. Those would have been beyond the scope of its jurisdiction. This may change now as well. The scope of *Allen and Hanburys* should likewise be extended. Third parties importing from WTO Members should be granted a licence of right on a non-discriminatory basis. The same should apply to *Generics v. Kline*. It should make no difference if the patent is worked in an EC Member State or in another WTO Member.

6. *Enforcement of rights and direct effect in the EC.*

Prior to the coming into effect of the WTO Agreement, the ECJ ruled, based upon their purpose, context and wording, that GATT rules had no direct effect⁽¹⁰⁶⁾. Private parties were only allowed to invoke GATT provisions if Community legislation expressly referred to them⁽¹⁰⁷⁾, or if the Community intended to implement an obligation entered into under GATT⁽¹⁰⁸⁾. It seems that the primary motivation behind the ECJ's reluctance to apply GATT law directly was the fact that other GATT contracting parties did not accord it direct effect, and the ECJ considered that such a unilateral approach might fetter the Community institutions in exercising their discretion in matters of foreign commercial policy⁽¹⁰⁹⁾.

The WTO Agreement has been said to possess the characteristics that should make its provisions directly effective⁽¹¹⁰⁾: The rules for trade in goods, including agriculture, are clear, comprehensive, and sufficiently precise, more so than the corresponding EC Treaty rules. Safeguards, anti-dumping and countervailing measures are detailed and clear; derogation from obligations is strictly controlled;

(106) Cases 21-24/72, *International Fruit Company v. Produktschap voor Groenten en Fruit*, [1972] ECR 1219, reiterated in the "banana" cases: C-280/93, *Germany v. Council*, [1994] ECR I-4973; C-469/93, *Amministrazione delle Finanze v. Chiquita Italia*, [1995] ECR I-4533; for a critical study see OTT, *GATT und WTO im Gemeinschaftsrecht* (Köln: Heymanns 1997).

(107) Case 70/87, *Fediol v. Commission*, [1989] ECR 1781, 1830 et seq.

(108) Case 69/89, *Nakajima v. Council*, [1991] ECR I-2069.

(109) HILF, *The role of national courts in international trade relations*, 18 *Michigan Journal of International Law* (1997), 321, 340.

(110) PETERSMANN, *The transformation of the world trading system through the 1994 Agreement Establishing the World Trade Organization*, 6 *EJIL* (1995), 161.

the dispute settlement system includes compulsory jurisdiction, automatic adoption of panel and appellate reports, and strict time limits; the multilateral agreements were presented as a package deal rather than a menu “à la carte”; Article XVI(4) of the Final Act embodying the results of the Uruguay Round requires Members to ensure the conformity of their laws, regulations and administrative procedures with their WTO obligations.

Nevertheless, EC Council Decision 94/800 on the conclusion of the Uruguay Round Agreements states in its preamble that, by its nature, the WTO Agreement is not susceptible to being directly invoked in Community or Member State courts ⁽¹¹¹⁾. The Council justified its position on the basis that the US and other Members explicitly ruled out direct effect ⁽¹¹²⁾. The unilateral declaration of the Council cannot settle the issue. Under Article 164 EC, the ECJ is entrusted with ensuring that “in the interpretation and application of this Treaty ... the law is observed”. The final decision in this matter should be made by the ECJ ⁽¹¹³⁾.

Any decision that the ECJ may take will be policy-oriented. If it chooses to accept the Council’s position, this would mean that reciprocity has taken priority. There are however two important policy considerations, related to the basic tenets of EC law, that may induce the ECJ to decide in favour of direct effect. The first relates to the binding nature of international commitments in EC law. Article 228 EC makes all Community international agreements binding on the Community institutions and the Member States alike. Since the Member States are also WTO members, they may find

(111) O.J. 1994, L 336/2.

(112) VAN DEN BOSSCHE, *The EC and the Uruguay Round Agreements*, in JACKSON and SYKES, *Implementing the Uruguay Round* (Clarendon, 1997), 23, 92-93; The Uruguay Round Agreements Act indeed contains a non self-executing clause, section 102(c); cf. JACKSON et al., *Legal Problems of International Economic Relations* 3rd ed., (West, 1995), 324-326.

(113) This approach, first forwarded by Prof. Mengozzi in *Les droits des citoyens de l’Union européenne et l’applicabilité directe des accords de Marrakech*, 4 *Revue du Marché Unique européen* (1994), 165, 174, has been recently endorsed by A.G. Tesauro in Case C-53/96, *Hermes International v. FHT Marketing Choice BV* (nyr 13.11.1997), recitals 23-25, as well as by the ECJ (nyr 16.6.1998), recitals 28, 32.

themselves in breach of their own obligations due to measures taken by Community institutions. Therefore, at least the Member States should be allowed to invoke WTO provisions. The second consideration touches an even deeper tenet. The Community's rule of law is based upon a new legal order, where citizens are not only objects but also subjects of that order, as so well emphasized by the ECJ in its landmark case *Van Gend en Loos* ⁽¹¹⁴⁾. It has been emphasized that, should the ECJ upset this rule with regard to its international obligations, this may well upset the system also inside the EC ⁽¹¹⁵⁾. It is the democratic legitimacy of the Community that may be at stake ⁽¹¹⁶⁾.

TRIPs is a special case in this respect. The preamble to Council Regulation 3288/94, which was enacted to implement the rules of TRIPs related to trademarks reads ⁽¹¹⁷⁾:

"[I]n order to ensure that all relevant Community legislation is in full compliance with the TRIPs Agreement, the Community must take certain measures in relation to current Community acts on the protection of intellectual property rights;" ...

This wording satisfies the rules set in *Nakajima* ⁽¹¹⁸⁾. The Council has expressed its intention to enact the regulation to fulfil their obligations under TRIPs not only with respect to trademarks but also with respect to all relevant Community legislation. This in itself should make it possible for individuals and Member States alike to invoke TRIPs provisions directly, provided that those fulfil the criteria of being clear, unconditional and not requiring, in principle, further implementing legislation to give them effect. Individuals and Member States are entitled to require that Community

(114) Case 26/62, [1963] ECR 1. It is noteworthy that, similarly to this landmark case, the first important preliminary question in respect of TRIPs was referred to the ECJ by a Dutch judge. Therefore, the ECJ was able, as it did in *Van Gend en Loos*, to leave the question of direct effect open. In fact, the Dutch judge did not even raise the question of direct effect of the TRIPs provision, *in casu* Art. 50(6) TRIPs: case C-53/96 *Hermès*, *op. cit.* Recital 35.

(115) MINGOZZI, *Les droits des citoyens de l'Union européenne et l'applicabilité directe des accords de Marrakech*, *cit.*, 174.

(116) MESTMACKER, *op. cit.*, *supra* note 72, 624 et seq.

(117) O.J. 1994, L 349/83.

(118) *Supra*, note 108.

secondary legislation conforms to TRIPs provisions. As to unharmonized legislation of the Member States, the right of their nationals to rely on TRIPs provisions in the national courts may depend upon the constitutional law of each Member State ⁽¹¹⁹⁾. The demarcation line between the competences of the Member States and the Community should, in case of doubt, be decided by the ECJ. If the ECJ pronounces itself competent to interpret the WTO provisions in their entirety, it would ensure the development of a uniform approach as well as the establishment of one legal order rather than sixteen divergent interpretations ⁽¹²⁰⁾.

The reasoning regarding the direct effect of TRIPs provisions should not rest only on legalistic grounds. If the result is implausible, the ECJ should not be held to its *Nakajima* ruling. Some other points come to mind: first, the preamble to TRIPs emphasizes that "intellectual property rights are private rights" ⁽¹²¹⁾. The TRIPs MFN and NT clauses likewise protect nationals rather than goods or services. In the absence of direct effect, there is danger that the standards set in TRIPs will be compromised, as private rights are best defended by their owners. Even the GATT rules, protecting the free movement of goods, have been taken in Germany to protect indirectly the importer's right to property and freedom of occupa-

(119) A forerunner of the expected tide is a decision given in the UK by JACOB J. in *R. v. Comptroller General of Patents ex parte Lenzing* (20 Dec. 1996), according to which it is impossible to invoke TRIPs provisions in the UK in order to review EPO decisions. See COOK, *Judicial review of the EPO and the direct effect of TRIPs in the European Community*, 19 EIPR (1997) 367.

(120) A.G. TESAURO, *supra* note 113, recitals 15-21, points out that the competences of the EC may develop and extend with time; EECKHOUT, *The domestic status of the WTO Agreement: Interconnecting legal status*, 34 CML Rev., 11, 14-24; For the disadvantages of splitting the competences with respect to mixed agreements see HARTLEY, *The Foundations of European Community Law* 3rd ed., (Oxford, 1994), 186.

(121) The German Federal Executive noted in the text of the bill for the Act of Consent by the Parliament that from 1996 onward TRIPs will be directly applicable. See HILF, *Negotiating and implementing the Uruguay Round: The role of EC Member States - The case of Germany*, in JACKSON and SYKES, *op. cit.*, *supra* note 112, pp. 121, 133. However, TRIPs provisions on law enforcement were excluded in the same document from direct applicability. See DREIER, *TRIPs and the enforcement of intellectual property rights*, in BEIER and SCHRICKER, *op. cit.*, *supra* note 56, p. 248, at p. 270.

tion ⁽¹²²⁾. Moreover, direct effect has been granted to provisions of the Paris and Berne Conventions. Comparing those with TRIPs provides an argument in favour of direct effect for TRIPs ⁽¹²³⁾.

Several arguments have been adduced against direct effect ⁽¹²⁴⁾. It has been maintained that granting direct effect to TRIPs provisions unilaterally may result in irrevocable ownership of IP rights as those are privately acquired; that direct effect would impair the capability of States to use TRIPs in dispute settlement to reestablish trade equilibrium, and will therefore weaken TRIPs; that direct effect of TRIPs provisions should therefore only be recognized in conjunction with granting direct effect to other GATT rules. If direct effect is granted by some Members, the disparities in IP protection between WTO Members would make companies subject to IP rights only in those Members, whereas their competitors, who operate in markets of other Members, will remain free from such restrictions. Members may be reluctant to amend the distortions by taking the non-complying Members through the WTO dispute settlement procedures. The distortion of competition experienced by the individual as a result of this disparity will be much greater than that felt by the entire economy of the violating Members even if trade sanctions are finally imposed on them.

There are also counter-arguments. First and foremost, those Members who comply with TRIPs would anyway find it very difficult to use TRIPs for cross-retaliation, since any measure or counter-measure taken may amount to expropriation of rights privately acquired, and this relates even to the law enforcement provisions.

The merits of the warning sounded against direct effect may however lie elsewhere. It may be taken as a warning that the EC should not all too quickly abandon regionalism in favour of the new economic order created by the package of WTO Agreements. It should first wait and see. Only if general compliance is achieved

(122) PETERSMANN, *Darf die EG das Völkerrecht ignorieren?*, 8 EuZW (1997), 325.

(123) DREXL, *The TRIPs Agreement and the EC: What comes next after joint competence?*, in BIER and SCHRICKER, *op. cit.*, *supra* note 56, p. 18, at p. 48.

(124) ULLRICH, *op. cit.*, *supra* note 56, 392-397.

should the EC take the steps needed to forego the internal integrated market that it had created.

How should this issue be decided? The problem can be mitigated by taking an indirect approach applying a rule of interpretation, according to which national and Community secondary legislation should be construed insofar as possible in accordance with the international commitments undertaken ⁽¹²⁵⁾. It is just one more step to adopt a rule of presumption, according to which the administrative authorities are presumed to be obliged, absent dire conflicting public interests, to apply their discretion in a manner that conforms with the international obligations ⁽¹²⁶⁾. Such an approach may allow for a cautious step-by-step assessment. However, it may offer no easier solutions to weighty issues such as the further maintenance of regional "exhaustion of rights". These issues must be tackled squarely and boldly.

The EC will have to make a choice. If the EC chooses to comply with TRIPs in full, then regionalism will have to give way to general MFN treatment. If, on the other hand, the EC chooses to preserve its internal market, it is submitted that this can only be achieved at the price of denying direct effect to TRIPs provisions; at the price of overruling *Nakajima*; and — most important — at the price of compromising the new legal order created by the EC, and denying the citizens of the Community the very rights that made the EC legal system unique, indeed a model for the rest of the world, and denying the Community its claim to legitimacy. Such a choice between two apparent evils represents a major challenge to regionalism.

(125) C-61/94, *Commission v. Germany*, [1996] ECR I-3989, recital 52; Opinion of A.G. Tesaurio and judgment, *supra* note 113, recital 38 and recitals 35-44 respectively.

(126) EINHORN, *The Application of WTO law by the Courts of Law in the EU and in Israel*, in RABELLO (Ed.), *Essays on European Law and Israel* (Jerusalem: Sacher Institute, 1996), pp. 1023, 1042; cf. GULMANN, *Denmark*, in JACOBS and ROBERTS (Eds.), *The Effect of Treaties in Domestic Law* (Sweet & Maxwell, 1987), pp. 29, 32-33.

V.

STATE DUTIES AND PRIVATE BARRIERS
TO INTERNATIONAL TRADE

JOANNA GOMULA

THE STANDARD OF REVIEW OF ARTICLE 17.6 OF THE ANTI-DUMPING AGREEMENT AND THE PROBLEM OF ITS EXTENSION TO OTHER WTO AGREEMENTS

SUMMARY: 1. Introduction. — 2. General Issues. — 2.1. Notion of Standard of Review. — 2.2. Historical Background. — 2.2.1. Regulations. — 2.2.2. GATT Panels. — 3. Article 17.6 and Other Dispute Settlement Provisions. — 3.1. Article 17.6 as an Element of Dispute Settlement under the Anti-Dumping Agreement. — 3.2. Article 17.6 as an Element of General WTO Dispute Settlement. — 4. Analysis of Article 17.6. — 4.1. Assessment of Facts. — 4.2. Assessment of Legal Issues. — 4.2.1. Interpretation of the Anti-Dumping Agreement. — 4.2.2. Standard of Review of Legality of National Measures. — 5. Extension of the Standard of Review. — 6. Conclusion.

1. *Introduction.*

Like many areas of the multilateral trade regime established by the Uruguay Round, the dispute settlement mechanism of the World Trade Organization ("WTO") has attracted much attention. This is not surprising in light of the significant activity of WTO panels and the Appellate Body ⁽¹⁾, with the first cases constituting a promising beginning for the new system. The system's most striking features, when compared to the regime under GATT 1947, are the rule of "negative consensus" governing the adoption of dispute settlement reports, and the establishment of the Appellate Body, a permanent judicial authority charged with ensuring the correctness of legal interpretations of the WTO agreements.

(1) As of 15 August 1997, 6 Appellate Body reports had been adopted, 1 panel report appealed and 2 panel reports issued. Moreover, there were 10 active panels and 33 pending consultations. *Dispute Settlement Overview Prepared by the WTO Secretariat*, August 21, 1997, <http://www.wto.org/dispute/bulletin.htm>.

The functioning of the general WTO dispute settlement system is regulated by the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") (2). Its provisions apply, in principle, to all WTO agreements (except for the Trade Review Mechanism and subject to a decision of the parties in the case of the Plurilateral Trade Agreements), which are referred to jointly as the "covered agreements". With the DSU setting out a general framework for disputes within the WTO, there are special or additional rules on dispute settlement in several of the covered agreements. These provisions, which have been listed in Appendix 2 to the DSU, prevail in case of conflict with the general rules and procedures of the DSU (Art. 1.2 of the DSU).

The provisions enumerated in Appendix 2 include paragraphs 4 through 7 of Art. 17 of the Agreement on Implementation of Article VI of GATT 1994 (commonly known as the "Anti-Dumping Agreement") (3). As will be discussed in more detail below, anti-dumping matters have been subject to special dispute settlement procedures since the Tokyo Round and, considering the nature of anti-dumping disputes, it is not surprising that the current procedures also derogate from the general rules. However, one provision, paragraph 6 of Art. 17, has introduced a new quality in this respect. It contains a number of directives for panels to follow when reviewing anti-dumping matters, relevant both for the assessment of facts and for the evaluation of legal determinations of national authorities, thus spelling out the "standard of review" for anti-dumping matters. It provides that when a panel examines such matters:

- (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of those facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(2) For its text see: *The WTO Dispute Settlement Procedures. A Collection of Legal Texts*, WTO 1995.

(3) Text in: *The Results of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts*, WTO 1995, p. 168-196.

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

To this date ⁽⁴⁾, no anti-dumping case has been reviewed by a WTO panel and as such Art. 17.6 has not yet been tested against practice ⁽⁵⁾. However, its importance cannot be underestimated, for at least two reasons. The first is the Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, adopted during the Uruguay Round (the "Ministerial Decision"), according to which "the standard of review in paragraph 6 of Article 17 [...] shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application" ⁽⁶⁾. As a consequence, the standard could in the near future be extended to other WTO agreements and become integrated into the Organization's general dispute settlement regime. The second reason relates to two disputes recently filtered through the complete (panel and Appellate Body) WTO procedure, which revealed that the standard of review is already a serious issue in the application of other WTO agreements. Both matters were brought under the Agreement on Textiles and Clothing in reaction to the imposition by the United States of transitional safeguards concerning imports from, re-

(4) 30 January 1998.

(5) However, as of 15 August 1997 four anti-dumping disputes were pending: complaint by Mexico against Guatemala in respect of an anti-dumping investigation with regard to imports of portland cement from Mexico (panel established), complaint by the E.C. against the United States in respect of anti-dumping duties imposed on imports of solid urea from the former German Democratic Republic (consultations) and two complaints by Korea against the United States: in respect of anti-dumping duties imposed on imports of color television receivers and in respect of a decision of the U.S. authorities not to revoke an anti-dumping duty on dynamic random access memory semi-conductors (both disputes are in the consultations phase).

(6) *The Results ...*, *op. cit.*, p. 453.

spectively, Costa Rica (the *Underwear* case) and India (the *Wool Shirts* case) (7).

The object of this paper is to provide an analysis of the standard of review of Art. 17.6, in an attempt to determine its most appropriate meaning and possible mode of future application, and to examine the prospects of the standard's extension to other WTO agreements, taking into account the findings of the above mentioned panels. The analysis will involve the situation of Art. 17.6 against other provisions on dispute settlement in the Anti-Dumping Agreement and the DSU. It will be preceded by a few general remarks on the notion of standard of review and the historical background of Art. 17.6, with an overview of respective GATT regulations and the approach adopted by some of the past GATT anti-dumping panels.

2. General Issues.

2.1. Notion of Standard of Review.

In most general terms, the problem of the standard of review (8), concerns the degree of deference that an international body should afford to the determinations of national authorities. It has been characterized as the specific question to what extent, when assessing governmental action, an international body should approach "the issues involved (including factual determinations) *de novo*, without any deference to national government" (9). In this sense, it is a

(7) *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/R (11 November 1996), WT/DS24/AB/R (10 February 1996) (both adopted 25 February 1997) and *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R (6 January 1997), WT/DS33/AB/R (25 April 1997) (both adopted 23 May 1997).

(8) Some authors use the plural form ("standards"), e.g., P. WAER, E. VERMULST: *EC Anti-Dumping Law and Practice after the Uruguay Round. A New Lease of Life?*, *Journal of World Trade*, Vol. 28 No. 2 (1994), p. 8. However, the single form is more common and has been used in the Ministerial Decision, and in both of the quoted panel reports.

(9) S.P. CROLEY, J.H. JACKSON: *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, *American Journal of International Law*,

coin's other side of the scope of discretion exercised by national authorities.

However, the standard of review may also be attributed a broader meaning. In the latter meaning, it concerns the criteria (including rules and principles of interpretation) that should be applied and taken into account by an international body when reviewing and evaluating national determinations. Deference to such determinations is but one element of the standard of review so understood. This meaning more adequately reflects the phenomenon covered by Art. 17.6 of the Anti-Dumping Agreement, its important consequence being that the standard of review should be viewed against the objectives of dispute settlement, not only those resulting from the Anti-Dumping Agreement, but also the general objectives of the DSU.

The concept of standard of review is not alien to other legal regimes, domestic or international. In fact, the standard adopted by Art. 17.6 was inspired by the so-called *Chevron* doctrine, which applies to the review of agency determinations by US courts. According to this doctrine courts should defer to an interpretation of an agency and refrain from substituting it with their own, even if they believe their interpretation to be preferable ⁽¹⁰⁾. Similar restrictions exist in other countries with respect to the review of administrative acts by superior authorities.

On the international plane, worth noting is the doctrine of the "margin of appreciation" developed by the European Court for Human Rights, according to which Member States are allowed a measure of discretion in the implementation of the European Convention for Human Rights. This has been characterized as the

Vol. 90 (1996), p. 194. According to the authors, another aspect of the problem is "how to reconcile competing views about the allocation of power between national governments and international institutions", *ibid.*, p. 194-5. See also E.U. PETERS-MANN: *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement*, Martinus Nijhoff 1997, p. 226-227.

(10) However, the deference is not absolute, for courts are required to defer to agency interpretations only if the statute is ambiguous and if the agency's interpretation is reasonable. For a presentation of the *Chevron* doctrine see S.P. CROLEY, J.H. JACKSON, *op. cit.*, p. 202-206.

Court's dilemma of "how to remain true to its responsibility to develop a reasonably comprehensive set of review principles appropriate for application across the entire Convention, while at the same time recognizing the diversity of political, economic, cultural and social situations in the societies of the Contracting Parties" (11). However, not much analogy can really be drawn to the GATT/WTO system in this case, because the application of the Convention is not so much about interpretation in the traditional sense, but rather about the saturation of its provisions with contents to develop common European standards, in circumstances where divergent economic and social policies must be taken into account.

A better analogy is provided by the North American Free Trade Agreement, which, like the WTO, covers a broad range of trade-related issues. Under Chapter 19 of the NAFTA, binational panels may be established to review anti-dumping and countervailing disputes arising out of the respective country's laws. The panels are required to apply the same standard of review as that applied by courts of the importing country. The mechanism according to which experts with different legal backgrounds are called upon to evaluate national decisions using standards not necessarily familiar to them has raised serious concerns among commentators of the NAFTA system (12). Because of the obvious drawbacks of this model, at least in view of hitherto practice, it is definitely not one that can be recommended for the WTO (13).

(11) R.St.J. MACDONALD: *The Margin of Appreciation* in: *The European System for the Protection of Human Rights*, ed. R.St.J. Macdonald, F. Matscher, H. Petzold, Martinus Nijhoff 1993, p. 83. See also H.Ch. YUROW: *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Martinus Nijhoff 1997.

(12) See R.E. BURKE, B.F. WALSH: *NAFTA Binational Panel Review: Should It Be Continued, Eliminated or Substantially Changed*, *Brooklyn Journal of International Law*, Vol. 20 No. 3 (1993-95), p. 535-559. The problems became acute in the *Softwood Lumber* case, where the panel and the extraordinary challenge committee established in this matter divided along national lines. See, e.g., Ch.M. GASTLE, J.G. CASTEL: *Should the North American Free Trade Agreement Dispute Settlement Mechanism in Antidumping and Countervailing Duty Cases be Reformed in Light of the Softwood Lumber III?*, *Law and Policy in International Business*, Vol. 26 No. 3 (1995), p. 823 *et seq.*

(13) In this context see the conclusions of Judge Wilkey (who served on one

The European Court of Justice has not developed a clear standard of review for anti-dumping matters, unless considerable deference shown until recently to determinations of EC authorities is said to constitute such standard ⁽¹⁴⁾. However, a principle has been distinguished relating to the evaluation by the Court of complex economic facts and circumstances in proceedings under Art. 173 of the EC Treaty. In such cases, the Court will limit its review to examining whether the evaluation of such facts by the relevant authorities carried a manifest error or misuse of powers ⁽¹⁵⁾.

2.2. *Historical Background.*

2.2.1. *Regulations.*

There were no counterparts of Art. 17.6 in previous GATT anti-dumping agreements. The Agreement on Implementation of Article VI of GATT of 30 June 1967 did not contain any dispute settlement provisions. This changed with the new Agreement of 12 April 1979, which introduced special dispute settlement procedures. Their major feature was the mandatory referral of anti-dumping disputes to conciliation carried out by the Committee on Anti-dumping Practices. Conciliation was also a prerequisite for the establishment of a panel to review a matter. However, the parties were not precluded from resorting to general GATT dispute settlement under Art. XXIII.

Initial Uruguay Round drafts of the new anti-dumping agreement did not substantially modify the 1979 rules, except for the elimination of the inefficient mandatory conciliation. However, later negotiations were influenced by an unexpected increase, as of the end of the 1980s, of anti-dumping actions. Within the framework of

of the extraordinary challenge committees established under NAFTA) in: M.R. WILKEY: *Introduction to Dispute Settlement in International Trade and Foreign Direct Investment, Law and Policy in International Business*, Vol. 26 No. 3 (1995), p. 631.

(14) See, e.g., E. VERMULST, P. WAER: *E.C. Anti-Dumping Law and Practice*, Sweet & Maxwell 1996, p. 159-162.

(15) See E. CREALLY: *Judicial Review of Anti-dumping and other Safeguard Measures in the European Community*, Butterworths 1992, p. 228, 280-290.

the GATT, out of 11 panel reports involving anti-dumping matters, as many as 8 were issued in 1990-95. Of these, 4 complaints were brought against the United States, which lost in 3 cases (these reports, as well as another in which the EC was defendant remain unadopted) (16). These defeats led the United States to strongly criticize "the perceived willingness of certain panels to overturn the actions of investigating authorities that were reasonable" (17). This state's efforts to place an express limit on the review by panels were supported, in particular, by the European Communities.

At one point during the Uruguay Round a single standard for the review by panels of national decisions was also contemplated, but the proposal was abandoned in view of strong opposition from US intellectual property circles (18). The most advanced suggestions of the standard's extension concerned the Agreement on Subsidies and Countervailing Measures (the "Subsidies Agreement") (19), which was partly justified by the many common problems of anti-dumping and countervailing duty investigations. In the end, the Subsidies Agreement went its own way, governed by other dispute

(16) For a list of adopted and unadopted antidumping panel reports see E. Vermulst, N. KOMURO: *Anti-Dumping Disputes in the GATT/WTO. Navigating Dire Straits*, *Journal of World Trade*, Vol. 31 No. 1 (1997), p. 44. Negotiations of new anti-dumping regulations at the Uruguay Round are presented by T.P. Stewart, S.G. Markel, M.J. KERWIN: *Antidumping. The GATT Uruguay Round: A Negotiating History (1986-1992)*, Kluwer Law and Taxation Publishers 1993, p. 258-260. The history of the Uruguay Round negotiations (including post-1992) in this area is also presented by J. CROOME: *Reshaping the World Trading System. A History of the Uruguay Round*, WTO 1995, p. 80-85, 208-213, 304-307.

(17) T.P. STEWART, S.G. MARKEL, M.J. KERWIN, *op. cit.*, p. 302. As noted by D. Palmeter, the limitation of the ability of panels to overturn domestic antidumping determinations became "a major negotiating goal" of the United States. D. PALMETER: *United States Implementation of the Uruguay Round Antidumping Code*, *Journal of World Trade*, Vol. 29 No. 3 (1995), p. 76. See also P.A. AKAKWAM: *The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role of GATT Panels in Reviewing National Antidumping Determinations*, *Minnesota Journal of Global Trade*, Vol. 5 (1996), p. 277, 283-85.

(18) See G.N. HORLICK, E.C. SHEA: *The World Trade Organization Anti-dumping Agreement*, *Journal of World Trade*, Vol. 29 No. 1 (1995), p. 31.

(19) See P.J. McDONOUGH: *Subsidies. The GATT Uruguay Round: A Negotiating History (1986-1992)*, Kluwer Law and Taxation Publishers 1993, p. 141.

settlement procedures of a special nature ⁽²⁰⁾. However, the Ministers issued a Declaration, which emphasized, with respect to dispute settlement pursuant to the Anti-Dumping Agreement and Part V of the Subsidies Agreement, "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures" ⁽²¹⁾. It is too much to say that this Declaration "extended" the standard of review of Art. 17.6 to countervailing duty cases. Rather, it can be interpreted as an encouragement of a uniform approach to problems common to the two areas (which for a long period had been treated jointly, both in GATT and in domestic regulations), such as the concepts of like products, domestic industry, material injury and causality. Paradoxically, the emphasis on consistency of dispute resolution suggests the strengthening, rather than limiting, of the role of panels in reviewing matters covered by the Declaration.

2.2.2. *GATT Panels.*

It has been asserted that the special provisions of Art. 17.6 "codify GATT anti-dumping panel practice" ⁽²²⁾. This may be an over-statement, in particular with respect to the review of legal issues, though the practice has been characterized by a certain degree of consistency. Over the period from the adoption of the GATT 1947 to the entry into force of the WTO Agreement, the panels' strategy in reviewing anti-dumping matters seems to have undergone an evolution, from a somewhat cautious approach of the

(20) For an overview see, e.g., J.R. CANNON, JR.: *Dispute Settlement in Antidumping and Countervailing Duty Cases* in: *The World Trade Organization. The Multilateral Trade Framework of the 21st Century and U.S. Implementing Legislation*, ed. T.P. Stewart, ABA 1996, p. 387 *et seq.*. The author also discusses in detail various proposals regarding dispute settlement during the Uruguay Round.

(21) *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures* in: *The Results ...*, *op. cit.*, p. 453. The Declaration uses "softer" language than the Ministerial Decision, stating only that the Ministers "recognize" (as opposed to "decide") the need for consistency.

(22) E. VERMULST, N. KOMURO, *op. cit.*, p. 32.

first panel to bolder, much more sophisticated methods of review applied by recent panels ⁽²³⁾.

There is no room to discuss in detail the past GATT panel reports, especially since these reports (adopted and unadopted) have been extensively presented elsewhere ⁽²⁴⁾. Therefore, this review will be limited to only some determinations of adopted panel reports. The first report worth particular notice is that in the *Transformers* dispute, which was initiated by Finland as a result of the levying by New Zealand of anti-dumping duties on electrical transformers ⁽²⁵⁾. In this case, in response to New Zealand's argument that a determination of material injury was a matter "specifically and expressly" reserved for the decision of a contracting party, the panel stressed that although such determination was the "responsibility" of the national authorities, the affected party could not be deprived of the possibility to challenge and scrutinize the authorities' action. According to the panel, "[t]o conclude otherwise would give governments complete freedom and unrestricted discretion in deciding anti-dumping cases without any possibility to review the action taken in the GATT. This would lead to an unacceptable

(23) For example, the first panel (which reviewed a complaint by Italy in respect of the Swedish system of minimum prices on imported stockings) stated, among others, "that it was not competent to deal with the legal rules which may exist in Sweden regarding procedures before customs authorities or the courts". In another place, it deferred to Sweden's assertion that no GATT provision could limit "in any way" the rights of the national authorities to decide whether dumping had taken place. *Swedish Antidumping Duties* (adopted 26 February 1955), BISD 3S/81, para. 15 and 23. However, this did not prevent the panel from concluding that a contracting party was obliged to establish certain facts prior to the imposition of anti-dumping duties. The panel also proceeded to what appears to be an attempt of a *de novo* review on the basis of the data provided by the parties, which, however, only resulted in the recommendation that the parties "try and clarify the facts on which the determination of dumping was based". *Ibid.*, para. 31-32.

(24) See, for example, E. VERMULST, N. KOMURO, *op. cit.*, p. 15-19; E.U. PETERSMANN: *Settlement of International and National Trade Disputes through the GATT: The Case of Antidumping Law in: Adjudication of International Trade Disputes in International and National Economic Law*, ed. G. Jaenicke, Switzerland 1992, p. 96-118.

(25) *New Zealand - Imports of Electrical Transformers from Finland* (adopted 18 July 1985), BISD 32S/55.

situation under the aspect of law and order in international trade relations as governed by the GATT" (26).

Similarly, in a later dispute concerning Korean anti-dumping duties on polyacetal resins imported from the United States (27), Korea raised the argument, among others, that "the Panel's job was not to conduct a *de novo* investigation nor to attach its own weights to the different factors" (relevant for the finding of injury) (28). The panel acknowledged that its judgment could not be substituted for that of national authorities as to the relative weight to be accorded to certain facts, nor that it was entitled to make its own independent evaluation of the facts before the authorities. It viewed its task as the review of the authorities' determination for consistency with the Anti-Dumping Agreement, "bearing in mind that in a given case reasonable minds could differ as to the significance to be attached to certain facts". However, the panel emphasized that a proper review of the determination of positive evidence for the purposes of the finding of injury required an examination "whether the factual basis of the findings articulated in the determination was discernible from the text of the determination and reasonably supported those findings. This entailed the need for the Panel to satisfy itself that there was sufficient reasoning in the determination as to the connection between this factual basis and these findings, and that the KTC [Korean authorities] had not relied upon incorrect factual information" (29).

The criterion of reasonableness, touched upon in the above case,

(26) *Ibid.*, para. 4.4. The panel in the *Underwear* case commented on this paragraph as follows: "We see great force in this argument. We do not, however, see our review as a substitute for the proceedings conducted by national investigating authorities or by the [Textile Monitoring Body]. Rather, in our view, the Panel's function should be to assess objectively the review conducted by the national investigating authority", WT/DS24/R, *op. cit.*, para. 7.12. However, it is difficult to agree with the panel's implicit assertion that the *Transformers* panel advocated "substitution" for national proceedings.

(27) *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States* (adopted 27 April 1993), BISD 40S/205.

(28) *Ibid.*, para. 57. The United States, too, had requested the panel not to "reweigh the evidence", but to examine the reasons offered in the Korean determination. *Ibid.*, par. 60.

(29) *Ibid.*, para. 227.

was much relied on by the panel in the *Salmon* dispute ⁽³⁰⁾. For example, when examining whether the authorities of the United States had properly determined majority support of the domestic industry for initiation of proceedings, the panel focused on whether the authorities had taken "such steps as could *reasonably* be considered sufficient", whether they could "*reasonably* have relied on the statements" of the petitioners and whether they could "*reasonably* treat the request" as being brought on behalf of the industry ⁽³¹⁾. The panel upheld most of the national determinations challenged by Norway. Among the exceptions was the improper consideration by the US authorities of the differences in weight of salmon in the comparison of normal value and export prices. The panel put an emphasis on the authorities' *awareness* that these differences could have affected price comparability ⁽³²⁾.

In the *Salmon* case the panel also set out the criteria for the review of facts, in the context of its examination whether the authorities' determination of material injury had been objective. The panel stated that such review "necessitated an examination whether the authorities had examined all relevant facts before them (including facts which might detract from an affirmative determination) and whether a reasonable explanation had been provided of how the facts as a whole supported the determination made by the investigating authorities" ⁽³³⁾. This approach was much relied on by the *Underwear* panel (see below).

The panel also addressed the problem of differing interpretations of the provisions of the 1979 Anti-Dumping Agreement. Norway had claimed that the method applied by the United States for comparison of normal value and export price was inconsistent with Art. 2.6. This provision, while requiring that the comparison be "fair", did not specify any particular method which should be

(30) *United States - Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* (adopted 26 April 1994) ADP/87. Findings published in *Handbook of GATT/WTO Dispute Settlement*, ed. P. Pescatore, W.J. Davey, A.F. Lowenfeld, Vol. 2, New York/The Hague 1991.

(31) *Ibid.*, para. 361-2 (emphasis added).

(32) *Ibid.*, para. 472.

(33) *Ibid.*, para. 492.

followed by the national authorities. The United States therefore asserted that the method used by its authorities, consisting in the comparison of average normal values to individual export prices, fell within the bounds of Art. 2.6. The panel accepted the latter position, though it took care to stress that the method's consistency with the relevant provisions should be evaluated on a case-by-case basis. The panel also pointed out that Norway had failed to satisfy the burden of proof in this respect ⁽³⁴⁾.

As can be seen from the above overview, panels dealing with anti-dumping disputes in the past have been careful to emphasize that they are not expected to perform a *de novo* examination of the matter. However, their review has often, in particular in response to challenges brought by the complaining party, taken the form of an acute scrutiny of the determinations of national authorities. In carrying out such review past panels have increasingly relied on the criterion of reasonableness, which seems to be fulfilled, with respect to facts, if the panel determines that the authorities have considered all relevant factors and have provided sufficient justification as to why some of those factors, and not others, have been used to support a determination.

Panels have not expressly distinguished issues of law from issues of fact. However, from the few instances of "purely legal" examination, it appears that an interpretation in support of a particular action will be accepted, if the relevant provisions do not explicitly prohibit such action and if the complaining party does not bring forward sufficient evidence to the contrary.

3. *Article 17.6 and Other Dispute Settlement Provisions.*

Article 17.6 is not an independent provision and must be viewed in the context of at least two sets of rules. First, it forms part of the Anti-Dumping Agreement, in particular its Art. 17, which contains

(34) *Ibid.*, para. 481. The panel also deferred to the U.S. interpretation of Art. 3.4 of the 1979 Anti-Dumping Agreement with respect to the degree in which the authorities were required to take into account possible causes of injury other than dumping.

provisions on consultations and dispute settlement applicable specifically to anti-dumping matters. Second, it is part of the general dispute settlement regime set out by the DSU.

3.1. *Article 17.6 as an Element of Dispute Settlement under the Anti-Dumping Agreement.*

The first three paragraphs of Art. 17 do not deviate from the provisions of the DSU and have not been listed as "special or additional rules" in Appendix 2.

The first of the special provisions, para. 4, specifies the conditions under which an anti-dumping matter may be referred to the Dispute Settlement Body ("DSB"). Referral may take place if the Member that requested consultations considers that they have failed to achieve a mutually agreed solution (thus, emphasis has been placed on the assessment of the situation by the complaining Member) and, more importantly, only if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings⁽³⁵⁾. There is no requirement of prior domestic judicial review of the authorities' action⁽³⁶⁾, but it should be noted that pursuant to Art. 13 of the Anti-Dumping Agreement the Members are required to maintain judicial, arbitral or administrative tribunals or procedures for the purpose, among others, of the prompt review of administrative actions relating to final determinations.

Pursuant to para. 5, a panel shall examine the matter based upon two categories of sources of information. The first is a written

(35) A matter may exceptionally be referred to the DSB after the imposition of only a provisional measure, subject to certain conditions.

(36) This seems to be a confirmation of the non-applicability of the exhaustion of local remedies rule to WTO matters. See, e.g., P. MENGOZZI: *The Marrakech DSU and its Implications on the International and European Level* in: *The Uruguay Round Results. A European Lawyers' Perspective*, ed. J.H.J. Bourgeois, F. Berrod, E.G. Fournier, Brussels 1995, p. 121-124 and R.S.J. MARTHA: *World Trade Disputes Settlement and the Exhaustion of Local Remedies Rule*, *Journal of World Trade Law*, Vol. 13 No. 4 (1996), p. 107. A different view is expressed by P.J. KUYPER: *The Law of GATT as a Special Field of International Law*, *Netherlands Yearbook of International Law* 1994, p. 227, 233-238.

statement of the complaining Member indicating how a benefit accruing to it, directly or indirectly, has been nullified or impaired, or that the achievement of the objectives of the Agreement is being impeded. The second includes the facts made available in conformity with the appropriate domestic procedures to the authorities of the importing Member. The specification of the latter category, in particular, may be regarded as a limitation on the factual scope of a panel's examination, for it seems to preclude the introduction of new evidence, despite the parties being different and even if such evidence could have a bearing on the result of the review ⁽³⁷⁾. However, if one of the panel's task is to determine whether the *authorities'* establishment of facts was proper, there is little justification for bringing in new facts (often intentionally withheld from national authorities), which could lead to the need of a *de novo* review by the panel.

On the other hand, Art. 17.5 does not seem to impede the parties from raising new legal arguments. To argue otherwise would be to ignore, above all, the different legal basis of the review: the Anti-Dumping Agreement, not domestic rules ⁽³⁸⁾.

The last of the special provisions, paragraph 7, deals with the important issue of confidentiality in anti-dumping proceedings, but does not have much bearing on the problem under consideration.

(37) However, the two-point list must not be regarded as exhaustive or limiting the panel's right to seek information, as set forth in Art. 13 of the DSU. In particular, it is obvious that the panel's examination of the matter must also be based on documentation issued by the authorities of the importing Member relating to the imposition of the anti-dumping measure. See J.R. CANNON, *op. cit.*, p. 384-385.

(38) See D. PALMETER, G.J. SPARK: *Resolving Antidumping and Countervailing Duty Disputes: Defining GATT's Role in an Era of Increasing Conflict, Law and Policy in International Business*, Vol. 24 (1992-93), p. 1158-1160. In the *Salmon* case the United States invoked the "principle" of preclusion of arguments not raised before the administering authorities (referred to by the United States as the concept of "exhaustion of administrative remedies"). However, the panel found no basis for the refusal to consider a claim merely because its subject matter had not been raised before the authorities, although it made clear that this conclusion was limited to the question of admissibility of the claim and, with respect to the review of its merits, the panel reserved the right to take account of whether or not the relevant issues had been raised before the authorities. ADP/87, *op. cit.*, para. 349-350.

3.2. *Article 17.6 as an Element of General WTO Dispute Settlement.*

Article 17 of the Anti-Dumping Agreement should not be viewed in separation from the general dispute settlement rules of the WTO. This systemic link is emphasized by Art. 17.1 which confirms that, subject to the exceptions in Art. 17, the DSU will be applicable to consultations and the settlement of disputes under the Anti-Dumping Agreement. This provision, as well as the already mentioned Art. 1.2 of the DSU, clearly indicate that settlement of anti-dumping disputes is within the framework of general dispute settlement. Therefore, just like the other provisions of the Anti-Dumping Agreement, so those of the DSU, form the context of Art. 17.6.

At first glance, the DSU itself provides almost no guidance as to what standard of review should be applied by WTO panels and there is no counterpart of Art. 17.6. However, upon more detailed analysis, a number of directives emerge from some of its provisions. One is Art. 3.2, which defines the WTO dispute settlement system as "a central element in providing security and predictability to the multilateral trading system". The system's general objectives are: to preserve the rights and obligations of the Members under the covered agreements and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law ⁽³⁹⁾. Article 3.2 further stipulates, in perhaps not very fortunate wording, that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements ⁽⁴⁰⁾. Of some relevance is also

(39) Pursuant to point (ii) of Art. 17.6 of the Anti-Dumping Agreement, these rules are also the basis of a panel's review of measures in anti-dumping matters (see below).

(40) This provision has a two-fold image. On the one hand, it states the obvious. On the other hand, it appears to be a limitation. S.P. Croley and J.H. Jackson believe that it may be interpreted as a "constraint on the standard of review" in the general dispute settlement system, "but possibly not to the extent of Article 17.6 of the Anti-Dumping Agreement", *op. cit.*, p. 200. It is difficult to imagine how this provision may prove a useful guideline in the future review of

Art. 3.5 which provides that all solutions under the dispute settlement procedure shall be consistent with the covered agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

According to the panel in the *Underwear* case, the "main relevant provision of the DSU" in respect of the standard of review to be applied to the Agreement on Textiles and Clothing ⁽⁴¹⁾ is Art. 11, which stipulates in part:

"The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

Article 11 places an emphasis on the objectivity of the review, which applies to the assessment of facts, the determination of the applicability of the relevant covered agreement to the matter, and the determination of whether or not the disputed measure is in conformity with such agreement. These criteria of review, formulated in most general terms, do not depart from what could be expected of any international judicial body. Nor do they conflict with the criteria contained in Art. 17.6 of the Anti-Dumping Agreement.

Upon comparison of the DSU and the Anti-Dumping Agreement one must conclude that there is nothing to indicate that dispute settlement under both instruments may have divergent objectives or that anti-dumping panels have significantly different functions from those attributed to panels in other matters. A subtle discrepancy in wording should, however, be noted between Art.

disputes. Instead, it is likely to be used as a political tool, with a losing party asserting, for example, that it has been deprived of its rights. Fortunately, to this date disputing parties have refrained from invoking it.

(41) WT/DS24/R, *op. cit.*, para. 7.9. Article 11 was also invoked by the panel in the *Wool Shirts* case, WT/DS24/R, *op. cit.*, para. 7.16.

17.6(ii), first sentence, of the Anti-Dumping Agreement and the relevant provision of Art. 3.2 of the DSU. While the latter speaks about the *clarification* of provisions in accordance with customary rules of interpretation of public international law, the former refers to their *interpretation*. However, it does not seem that the parties to the Anti-Dumping Agreement intended to give a special meaning to this term (Art. 31.4 of the Vienna Convention). It is more likely that this nuance is a result of drafting imperfection rather than weighed consideration ⁽⁴²⁾.

4. *Analysis of Article 17.6.*

Article 17.6 is divided into two points, each of which deals with a different aspect of a panel's examination of a matter. Point (i) concerns the assessment of the facts of a matter. Point (ii) sets out rules for interpreting the relevant provisions of the Anti-Dumping Agreement. Accordingly, when discussing the standard of review, two groups of problems should be distinguished: the standard applicable to the evaluation of facts and the standard applicable to the evaluation of legal determinations. It is, of course, not always easy to distinguish questions of law from questions of fact, as is amply demonstrated in past panel practice. However, this distinction is not unusual and appears in other WTO provisions. For example, pursuant to Art. 17.6 of the DSU, a Member's appeal in any WTO dispute should be limited to issues of law covered in the panel report and legal interpretations developed by the panel. In other words, the Appellate Body has no basis for reviewing the assessment of facts by panels, its deference in this respect being absolute.

The discussion below will adhere to the structure of Art. 17.6.

(42) The use of the term "clarify" rather than "interpret" in Art. 3.2 of the DSU is justified in light of the mechanism of authoritative interpretation, to which only the Ministerial Conference and the General Council are entitled (Art. IX of the WTO Agreement, Art. 3.9 of the DSU). It is difficult to imagine that the parties had intended to assign broader powers in this respect to anti-dumping panels.

4.1. *Assessment of Facts.*

According to Art. 17.6(i), when assessing the facts of the matter a panel should determine whether the national authorities' establishment of the facts was proper and whether the authorities evaluated these facts in an unbiased and objective manner. The panel is precluded from overturning the evaluation of the authorities if it finds that the above requirements have been fulfilled, even though the panel might have reached a different conclusion.

The focus is thus on the panel's examination of the authorities' approach to the establishment and evaluation of the facts, not on the examination of the facts *per se*. However, although it is obviously a discouragement of a *de novo* review by the panel, it does not totally preclude the panel from an independent consideration of the facts. After all, the panel is required to carry out an "assessment of the facts", and it may even "reach a conclusion" of its own.

The principle of "factual deference" to the conclusions of national authorities (provided that the conditions of point (i) are met) finds justification in the nature of the provisions of the Anti-Dumping Agreement, and in the nature of anti-dumping matters as such. Complicated calculations and analyses are required to determine the existence of dumping, the dumping margin, injury and causality. National authorities have access to data, knowledge and expertise, which should, at least in theory, permit them to collect sufficient information and make a proper evaluation of the facts ⁽⁴³⁾. A WTO panel is not the appropriate forum to conduct such detailed examinations. Rather, its function is to investigate whether any errors have been made by the authorities in the process of evaluating the facts ⁽⁴⁴⁾.

(43) In the *Underwear* case, the United States argued that "the Panel should take into account that domestic authorities were uniquely well-placed to scrutinize and evaluate the situation in a domestic industry", WT/DS24/R, para. 5.41.

(44) M. Hilf believes that "panels are designed to act as an appellate body and thus not exercise a second full investigation of the factual situation". In the author's opinion because of time constraints panels will be unlikely to often call experts under Art. 13 of the DSU. M. HILF: *The Role of National Courts in International Trade Relations*, *Michigan Journal of International Law* Vol. 18 No. 2 (1997), p. 323.

The criteria articulated in point (i) should not raise serious problems for anti-dumping panels. For example, it may be presumed that the authorities' establishment of facts is "proper", if the authorities have taken care to collect sufficient information to determine the state of facts of the matter, in compliance with the procedures and requirements set forth in the Anti-Dumping Agreement ⁽⁴⁵⁾.

However, some doubts are cast by the condition that the evaluation be "unbiased and objective". Evidence to the contrary is not likely to be found in official documentation and it may be very difficult for the complaining party to demonstrate that the authorities' evaluation has been flawed by these factors ⁽⁴⁶⁾. It may happen, however, that panels will find bias and subjectivity "inherent in any unconvincing evaluation of the facts which *de facto* results in favoring the importing country's domestic industries" ⁽⁴⁷⁾.

There is another problem with the criteria of point (i). Assuming that the evaluation was unbiased and objective, there is no explicit basis for overturning such evaluation if the panel finds, for example, that it was carried out in an incompetent way. In other words, although Art. 17.6 provides for the proper *establishment* of facts, there is no explicit requirement of their proper *evaluation*. The "missing link" seems to be the criterion of proper or adequate *evaluation*, of a content similar to the criterion of reasonableness employed by panels in the past. There is some force in the argument that this criterion may be "couched" within the requirements of lack

(45) In Costa Rica's view expressed in the *Underwear* case, to determine the proper establishment of facts "the Panel should confirm that, on the basis of the specific and relevant information submitted, a detailed examination has been carried out [...] [T]here must be a reliable and logical correlation between the information in question and its examination, on the one hand, and between the latter and the establishment of the facts, on the other", WT/DS24/R, *op. cit.*, para. 5.65.

(46) The problem of burden of proof is a separate matter, especially in view of the principle recently approved by the Appellate Body in the *Woven Shirts* case, which may be characterized as "re-burdening with proof". See WT/DS33/AB/R, p. 16-17.

(47) P. WAER, E. VERMULST, *op. cit.*, 1994, p. 9.

of bias and objectivity ⁽⁴⁸⁾. Were it otherwise, panels would be precluded from properly exercising their function and responsibility of assessment of the facts of the matter. This function and responsibility must be viewed in the context of other WTO provisions, including those of the DSU, whose Art. 11, as we have seen, requires a panel to make "an objective assessment of the facts of the case". Special procedures notwithstanding, any WTO panel is, above all, an element of the dispute settlement system created by the DSU.

4.2. *Assessment of Legal Issues.*

Point (ii) of Art. 17.6 deals with a panel's examination of legal issues. It addresses two important problems: first, what may be referred to as "the standard of interpretation" of the Anti-Dumping Agreement and, second, the standard of review of consistency of national measures with the Agreement. A panel is required to interpret the relevant provisions of the Anti-Dumping Agreement in accordance with customary rules of interpretation of public international law. Where it finds that a relevant provision of the Agreement admits more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

4.2.1. *Interpretation of the Anti-Dumping Agreement.*

The requirement of interpretation in accordance with customary rules of interpretation of public international law conforms to the general principle stipulated in Art. 3.2 of the DSU. It is generally accepted, and has been confirmed by the first WTO panel and Appellate Body reports, that such rules include the rules of treaty interpretation of the Vienna Convention on the Law of Treaties.

More problematic is the second part of point (ii) contemplating a situation where more than one (that is, two or more) permissible interpretations are discovered. It has been argued that this provision conflicts with the first sentence of point (ii), because the Vienna Convention on the Law of Treaties precludes multiple interpreta-

(48) See D. PALMETER, *op. cit.*, p. 77.

tions⁽⁴⁹⁾. However, in reality, there are as many interpretations as there are lawyers and the relevant provisions of the Vienna Convention seem to be a confirmation, rather than a contradiction, of this truth. Perhaps, therefore, there is after all no striking conflict between the first and second sentences of point (ii). Perhaps the acknowledgement of multiple permissible interpretations is not incorrect *per se*, and not even an exception to the rule laid down in the first sentence.

This should in no way be regarded as an invitation to legal frivolity in the process of construction of the Anti-Dumping Agreement. There are sufficient safeguards to prevent this, some of which are provided by the Vienna Convention itself. If the two sentences of point (ii) are read jointly, an interpretation will be unacceptable if, among others, any of the following have occurred: the interpretation was not in good faith, the terms were not given their ordinary meaning, the context of the terms or the object and purpose of the treaty were ignored, a special meaning was given to a term despite the intention of the parties, the resulting meaning is ambiguous or obscure, or the result is manifestly absurd or unreasonable. Moreover, in line with general rules of interpretation, anti-dumping panels will have to take into account other relevant provisions of the WTO agreements, as well as, at least to some extent, the GATT *acquis*.

Therefore, the notion of multiple permissible interpretations may prove not to be such an obstacle to good legal judgement as it appears on first sight. However, as will be further discussed below, the real impact of the discussed provisions of point (ii) will ultimately depend on the approach taken by panels, because "[i]t will be up to the panels to ensure that this wording does not result in overly loose interpretations of WTO rules and diverging rules and practices of WTO Members" (50).

(49) See G.N. HORLICK, E.C. SHEA, *op. cit.*, p. 30. Skepticism is also expressed by S.P. CROLEY and J.H. JACKSON, *op. cit.*, p. 200. In the opinion of E. Vermulst and P. Waer the second sentence of point (i) may be an exception to the rule expressed in the first sentence, *op. cit.* 1996, p. 5.

(50) E. VERMULST, P. WAER, *ibid.*

4.2.2. *Standard of Review of Legality of National Measures.*

It follows from point (ii) that in situations where more than one permissible interpretation is found, a panel must declare a measure to be in conformity with the Anti-Dumping Agreement if it rests upon one of those interpretations, irrespective of whether in the panel's opinion it is the preferred one. If the panel finds only one permissible interpretation, a measure will be in violation of the Anti-Dumping Agreement if it rests upon any other interpretation.

As has been mentioned above, the standard of review articulated in Art. 17.6 has been based on the *Chevron* doctrine, applicable in the review of agency determinations by US courts. There are of course some similarities between the review of anti-dumping measures by panels and the scrutiny of administrative decisions by domestic courts. However, the analogy ends where structural and systemic differences come into play. D. Palmeter has rightly characterized the analogy as "false", for the primary reason that "US courts review agency decisions for conformity with the law applied by the agency", while panels "review decisions for conformity with the [Anti-dumping] Code, not for conformity with the national law applied in the action" ⁽⁵¹⁾. E.U. Petersmann points out that "the objectives, applicable law and procedures of intergovernmental GATT dispute settlement proceedings over the rights and obligations of governments under GATT law differ very much from those of domestic anti-dumping investigations, which are based on national administrative law and involve private traders whose interests [...] might differ very much from those of the export countries" ⁽⁵²⁾. When analyzing a measure, the panel and the national authorities are interpreting different provisions (the Anti-Dumping Agreement and domestic regulations, respectively) and applying different rules

(51) D. PALMETER, *op. cit.*, p. 76. The author notes that there is more analogy to the tasks of WTO panels in U.S. federal courts reviewing the federal constitutionality of decisions of state courts construing a state law, where federal constitutional standards are relevant at the time of their application by the federal court (not at the time of application of state law by a state court). *Ibid.* See also D. PALMETER, G. SPAK, *op. cit.*, p. 1149.

(52) E.U. PETERSMANN, *op. cit.* 1997, p. 226.

of interpretation (customary rules of public international law and domestic rules, respectively) ⁽⁵³⁾. Disregard of this qualitative divergence in favor of an uncritical analogy to the *Chevron* doctrine may lead to extreme conclusions.

For example, it has led some authors to suggest the following steps for a panel's review of an anti-dumping matter: first, the panel must determine whether there exists more than one permissible interpretation; then, if the panel's determination is negative, the panel must present the only permissible interpretation; if, however, the determination is positive, the panel must analyze whether the national interpretation is within the scope of "permissibility" ⁽⁵⁴⁾. It is difficult to imagine how a panel would go about this tremendous interpretational task. Rather, a panel will first examine whether the provisions of the Anti-Dumping Agreement contain any explicit prohibitions for the measure. In the absence of such prohibitions, the measure will be presumed to be in conformity with the Agreement. Second, if in the course of subsequent interpretation no unequivocal support is found for the measure, it will be nevertheless upheld if it rests on an acceptable, even though not a "preferable", interpretation. Panels may also be encouraged to present the "most correct" interpretation, but in view of the "judicial self-restraint" exercised by WTO panels, this may not become practice. Instead, panels are likely to reserve their position by invoking the need for a case-by-case approach.

It should be emphasized that the panel's role is not to review the *interpretation* applied by the national authorities; rather, it is to determine whether the *measure* rests upon a permissible interpretation arrived at by the panel (as required by the first sentence) through the application of customary rules of interpretation ⁽⁵⁵⁾. Just like national authorities are not expected to excel at interna-

(53) "Whereas in national procedure the court is reviewing a national administrative action or determination under the national law, such as a statute, the international body has the task of ascertaining the meaning and application of an international norm". S.P. CROLEY, J.H. JACKSON, *op. cit.*, p. 209.

(54) *Ibid.*, p. 200.

(55) Point (ii) stipulates that "the panel shall find the authorities' measure to be in conformity with the Agreement if *it* rests upon one of those permissible

tional trade law, so panel members are not required to have extensive knowledge of particular domestic legislation. Just like national courts should be concerned with the legality of administrative decisions, so panels should stand on guard of the proper application of WTO law. Should it be otherwise, some absurd conclusions would follow, including the expectation that panels scrutinize national measures from the point of view of the respective domestic law or that a measure, objectively conforming to the Agreement, must be declared inconsistent with the Agreement because the national authorities have not applied the proper interpretation. In the *Underwear* case it was stressed that "the task of the Panel is to examine the consistency of the US action with the international obligations of the United States, and not the consistency of the US action with the US domestic statute implementing the international obligations of the United States" (56). This should fully apply also to panels reviewing anti-dumping matters.

What then is the meaning of the second sentence of point (ii)? The essence of the controversial language seems to be for panels to exercise more leniency when dealing with anti-dumping measures. Many provisions of the Anti-Dumping Agreement allow for a certain degree of discretion on the part of the national authorities. Many do not provide decisive guidance as to what should be their ultimate interpretation, are ambiguous or silent about certain issues. So long as the contested measure has a sound basis in the provisions of the Anti-Dumping Agreement and remains within the bounds of the customary rules of interpretation of public international law, it should be upheld.

There is, of course, a danger that panels will be under pressure, especially from importing Members whose actions are challenged, to slavishly defer to the determinations of national authorities (57). An

interpretations" (emphasis added). "It" concerns the *measure*, and not the *interpretation* applied by the national authorities.

(56) WT/DS24/R, *op. cit.*, para. 7.12.

(57) For example, R. Hudec stipulates that "an AD/CVD measure is the result [of] a highly judicialized administrative proceeding, in which the remedy, once issued, becomes legally binding on executive officials as a matter of national law. Consequently, governments usually have little room to negotiate, even when

earnest of this was displayed by the United States' approach in the *Underwear* and *Wool Shirts* disputes. This attitude could lead to what many authors fear: that Art. 17.6 will become a mechanism of approving inconsistent interpretations⁽⁵⁸⁾, with panels becoming "mere figureheads for rubber-stamping protectionist determinations of national agencies"⁽⁵⁹⁾. It could result in a discouragement for Members to seek to improve anti-dumping regulations, by creating a temptation to settle at the "lowest common denominator" of legal interpretation, in favor of short-term interests of the importing country. But today's advocates of imposing strict constraints on panels should beware that tomorrow the result could well work against them.

However, and fortunately for panels, anti-dumping laws are becoming more detailed, as they regulate with more specificity not only complex technical issues, but also procedural matters⁽⁶⁰⁾. Irrespective of the criticism deserved by the Anti-Dumping Agreement, it is overall a positive development, which has limited, rather than broadened, the discretion of national authorities. The more detailed and unequivocal the provisions of the Anti-Dumping Agreement, the easier it will be for panels to determine the limits of "permissibility" of their interpretations.

In cases of doubt, the objectives and interests of the WTO trading system should always prevail⁽⁶¹⁾. One of the goals of the

the AD/CVD measure violates GATT obligations". R. HUDEC: *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, Butterworth Legal Publishers 1993, p. 344. But the above reasons do not provide sufficient justification for deference to national determinations.

(58) See D. PALMETER, *op. cit.*, p. 76 and E.U. PETERSMANN, *op. cit.* 1997, p. 227. Both authors assert that this could lead to a legal "tower of Babel". Petersmann also notes that there are "no precedents in international adjudication that the parties to a multilateral agreement may construe their treaty obligations in a divergent and mutually conflicting manner". *Ibid.*, p. 228.

(59) P.A. AKAKWAM, *op. cit.*, p. 295.

(60) See D. PALMETER, G. SPÄK, *op. cit.*, p. 1152.

(61) P. Waer and E. Vermulst note that Art. 17.6 contains "some escape language which potentially could result in less stringent evaluations of anti-dumping measures under the WTO" and hope that despite such language panels will "stand up to their responsibility of ensuring a consistent, fair and uniform application of the WTO anti-dumping law", *op. cit.*, 1997, p. 5. Other authors point

WTO dispute settlement system is to provide security and predictability to the multilateral trading system, and one of its essential functions is to preserve the rights and obligations of Members (Art. 3.2 of the DSU). This can only be achieved if priority is given to ensuring uniformity, to the largest extent possible, of the interpretation and application of WTO law, including anti-dumping regulations. No authority is better suited for this task than a panel, supported by the Appellate Body. The importance of the latter should be emphasized here, for it is precisely this organ that "could become the ultimate guardian of the consistent and uniform application of anti-dumping laws" (62). Moreover, its existence should provide sufficient assurance that panels will not be allowed to interpret the Anti-Dumping Agreement in an arbitrary manner.

5. *Extension of the Standard of Review.*

The "extension" of the standard of review to other WTO agreements is not necessarily tantamount to its "general application", as stipulated in the Ministerial Decision. Each of the WTO agreements may require a different standard of review. This seems to have been the panels' understanding in the *Underwear* and *Wool Shirts* disputes, both of which refused to treat the transitional safeguards regimes under the Agreement on Textile and Clothing (the "ATC") as a safeguard regime under Art. XIX of GATT, as had been suggested by the United States, and, in consequence, to apply the standard of review assumedly appropriate for the latter regime (63). However, the panels relied on Art. 11 of the DSU, though in no way

out that the provisions of Art. 17.6 are "obviously designed to cabin the discretion of dispute settlement panels and reduce the likelihood that they will overturn specific administrative decisions or find national rules to be incompatible with GATT rules", but believe that because the provisions are worded in general terms, they may not have much practical effect, *The Handbook ...*, p. 73.

(62) P.A. AKAKWAM, *op. cit.*, p. 308.

(63) The *Underwear* panel made clear that it was examining the problem "in the context" of the ATC, while the *Wool Shirts* panel stated outright that the ATC had instituted a new regime for textile products and proceeded to examine its role on the basis of this assumption. WT/DS33/R, *op. cit.*, para. 7.15 and WT/DS24/R, *op. cit.*, para. 7.12.

was it suggested that the standard articulated by each of them was to apply generally, to other agreements covered by the DSU.

Both panels took note of the existence of Art. 17.6 of the Anti-Dumping Agreement, but considered it inapplicable to the respective disputes. However, the *Underwear* panel was clearly inspired by the analogy of its task to the review carried out by past panels dealing with anti-dumping or countervailing duty matters, and it invoked several GATT panel reports in these fields.

Also the parties to the proceedings did not insist on the use of the standard of Art. 17.6 to the disputes. The United States, which was the defendant in both matters, favored what it described as a "standard of reasonableness" (or "standard of reasonableness and good faith examination of the data"). It relied mainly on a 1951 report of a working group established to examine the consistency with Art. XIX of GATT of certain US restrictions relating to the importation of fur felt hats from Czechoslovakia (the *Fur Felt Hat* case) (64). The working group had not required the United States to prove conclusively that the imports had caused serious injury, arguing that "since the question under consideration is whether or not [the United States] are in breach of Article XIX, they are entitled to the benefit of any reasonable doubt". It had concluded that the authorities "had investigated the matter thoroughly on the basis of the data available to them at the time of their enquiry and had reached in good faith the conclusion that the matter fell within the terms of Article XIX as in their view it should be interpreted".

Opposing the United States, Costa Rica, the complaining party in the *Underwear* case, proposed a very elaborate five-step standard of review. It was to include an examination by the panel of whether the authorities had: complied with the procedural rules, properly established the facts, made an impartial and objective evaluation of the facts, properly exercised their discretion in the interpretation of the rules and complied with the rules in general (65).

(64) The case is presented in WT/DS24/R, *op. cit.*, para. 5.32-5.37.

(65) WT/DS/24/R, *op. cit.*, para. 7.7. Upon comparison, all the elements of the standard of review proposed by Costa Rica could be said to be reflected in Art. 17.6.

The *Underwear* panel made an attempt to find the “golden middle”: it rejected total deference to the findings of the national authorities, but at the same time declined to consider its role as a substitute for the national proceedings. The standard selected by it consisted in “an examination whether [the authority] had examined all relevant facts before it (including facts which might detract from an affirmative determination [of injury]), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of the United States” (66). This standard bears much resemblance to the approach advocated by the *Salmon* panel (67). Two differences can be noted: first, use of the criterion of “adequate explanation” in place of “reasonable explanation” and, second, emphasis on the consistency of the authorities’ determination with international obligations.

The *Wool Shirts* panel took a wholly different approach, defining its function strictly in the terms of Art. 11 of the DSU as “limited to making an objective assessment of the facts surrounding the application of the specific restraint [...] and of the conformity of such restraint with the relevant WTO agreements” (68). The panel did not expound further on the standard of review, rejecting as irrelevant previous GATT panel reports and leaving an impression that its task was confined by narrow, rather than more flexible, boundaries. However, both the *Underwear* and the *Wool Shirts* panel reports should be assessed positively for their attitude towards the most crucial element of panel review: the panel’s authority to examine a measure’s consistency with WTO regulations, irrespective of national determinations.

Of some relevance, because it shows how the standard of review may vary depending on the nature of the case, is also the *Hormones* case, which concerned a complaint against a ban imposed by the

(66) WT/DS24/R, *op. cit.*, para. 7.13.

(67) In a footnote to para. 7.13 the panel admitted that this approach was largely consistent with the approach adopted by the anti-dumping and subsidies panel reports to which it had referred in its report.

(68) WT/DS33/R, *op. cit.*, para. 7.17.

European Communities on importation of meat from cattle treated with certain types of hormones ⁽⁶⁹⁾. Having applied a strict interpretation of the relevant provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement"), the panel did not allow much discretion in the assessment of risk by a Member and rejected, for lack of adequate scientific justification, the propriety of the prohibition enacted by the EC authorities. Worth noting is that the panel took full advantage of the provisions of both the SPS Agreement and the DSU to request the opinions of experts on certain complex scientific and technical issues relating to the ban ⁽⁷⁰⁾. In consequence, it carried out an independent examination of the facts.

While the *Hormones* case is an example of a panel's extensive review of facts, another recent case is crucial for the legal aspect of the standard of review. The *Coconut* case concerned countervailing duties imposed by Brazil on imports of coconut from the Philippines, which took effect after the entry into force of the WTO Agreement, but as a result of proceedings initiated under the GATT 1947 ⁽⁷¹⁾. Transitional provisions prevented the application of the WTO Subsidies Agreement to the contested measures. The Philippines therefore based its claim on Art. VI of GATT 1994, arguing for its independent application and interpretation. The panel rejected this contention. It noted that the WTO Subsidies Agreement and its Tokyo Round predecessor "were developed in part to lend greater precision and predictability to the rights and obligations under Article VI", which could have a different meaning "if read in isolation than if read in conjunction" with the Subsidies Agree-

(69) *EC-Measures Concerning Meat and Meat Products*, WT/DS26/R (18 August 1997). Two reports were issued, addressing separate complaints brought by the United States and Canada.

(70) The panel did not establish an expert review group, as envisaged by the DSU, but chose instead to address a list of questions to individual experts, on the basis that it had the "right to seek information from individual experts". The panel considered it more useful to be given a full range of opinions from individuals, rather than a consensus view of an expert review group. *Ibid.*, Findings, Point B.1.

(71) *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/R (17 October 1996), WT/DS22/AB/R (21 February 1997) (both adopted 20 March 1997).

ment⁽⁷²⁾. While under the GATT a separate application of Art. VI had been possible, the WTO Agreement had introduced a new quality in the relations among the Members. The panel drew attention to the object and purpose of the WTO Agreement, in particular, that provided for in the Preamble, which is to “develop an integrated, more viable and durable multilateral trading system”. It stressed that the new regime was a “single undertaking” and one of an “integrated nature”, with an “integrated dispute settlement system [which] avoids the legal and procedural fragmentation” of the previous regime. In the panel’s opinion “[t]o revert to a situation where Article VI of GATT 1994 could have different meanings [...] would perpetuate in part the legal fragmentation that the integrated WTO system was intended to avoid”⁽⁷³⁾.

The above reasoning equally applies to the Anti-Dumping Agreement, for which, like in the case of the Subsidies Agreement, Art. VI is the general basis⁽⁷⁴⁾. The object of the Subsidies Agreement, to give “greater precision and predictability to the rights and obligations under Article VI”, is also viable for the Anti-Dumping Agreement. An anti-dumping panel must respect the “integrated nature” of the WTO system, must avoid its “legal and procedural fragmentation”, and must take into account the general function of dispute settlement specified in Art. 3.2 of the DSU: that of providing security and predictability to the system. These are considerations that may not be overridden in the application and interpretation of Art. 17.6 of the Anti-Dumping Agreement.

6. Conclusion.

As can be seen from the above, there has been no willingness on the part of WTO panels to extend the standard of Art. 17.6 to the review of matters covered by other WTO agreements, even where

(72) WT/DS22/R, *op. cit.*, para. 238.

(73) *Ibid.*, par. 242. See also WT/DS22/AB/R, *op. cit.*, p. 18.

(74) The similarities of the situation and solutions of the two Agreements were noted by the panel, e.g. WT/DS22/R, *op. cit.*, note 70, and by the Appellate Body, WT/DS22/AB/R, *op. cit.*, note 23.

the nature of the matter could justify such application. This reluctance, caused without doubt by the ambiguity of the solution adopted in the Anti-Dumping Agreement, may be expected to continue so long as the precise meaning of the relevant provisions remains unclear. In particular, the legal aspect of the standard does not seem to appropriately reflect and secure the fundamental objectives of the new dispute settlement system. This does not mean, especially bearing in mind the different approaches adopted by panels in the *Underwear* and *Wool Shirts* disputes, that it would not be advantageous for the system if a uniform standard of review were adopted for matters involving a panel's evaluation of the determinations of national authorities.

However, when the question of one "general" standard is considered, the broad range of problems potentially covered by the WTO system may speak against advocating its introduction. The scope of necessary panel scrutiny may vary from case to case, depending on the nature of the matter. Panels should have some degree of flexibility in this respect, at least in the first formative years of the functioning of the system.

To close these remarks, one reflection is appropriate: in discussions on the standard of Art. 17.6, one should not only consider whether it is suitable for extension or general application, but also whether this standard, in its present form, is really adequate also for anti-dumping matters.

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RESTRICTIVE BUSINESS PRACTICES IN INTERNATIONAL TRADE AND THE ROLE OF THE WORLD TRADE ORGANIZATION (*)

SUMMARY: SECTION I - SHOULD INTERNATIONAL MULTILATERAL COOPERATION NOW BE EXTENDED TO DEAL WITH RESTRICTIVE BUSINESS PRACTICES? — 1. Multilateral *versus* Bilateral Cooperation. — 2. Legitimacy of International Cooperation within the WTO. — 2.1. The Havana Charter. — 2.2. Objectives and scope of the WTO. — 2.3. Changes in Members' political commitment. — 3. Limits of Action Against Restrictive Practices within the WTO. — SECTION II - *DE IURE CONDITO*: EXISTING INSTRUMENTS WITHIN THE WTO THAT COULD BE USED TO PREVENT GOVERNMENT ACTION. — 4. Recourse to Traditional GATT Instruments to Prevent Discrimination by way of Internal Measures. — 5. Business Practices in Services. — 6. Nullification or Impairment. — 6.1. The WTO Agreement as an integrated system and the impairment of its *effet utile*. — 6.2. Main features of nullification and impairment provisions. — 7. The Inherent Limitations of Current WTO Measures. — SECTION III - *DE IURE CONDENDO*: WHETHER TO INSERT AN EXPLICIT DUTY UPON MEMBERS TO FAVOUR COMPETITION DOMESTICALLY OR TO ADOPT A FULLY-FLEDGED COMPETITION CODE. — 8. The Alternatives. — 9. The Insertion of a Specific Duty to Prohibit and Prevent Domestically Restrictive Practices Hindering Market Access. — 9.1. The proposals on the table and the grounds for regarding market access as a general principle of trade law. — 9.2. States' liability for infringing the obligation to prohibit and prevent restrictive behaviours. — 9.3. How the trade solution and the application of domestic anti-trust legislation complement each other. — 10. Procedure for the Settlement of Disputes. — 10.1. An intergovernmental solution. — 10.2. The extension of Article 17.6 of the Agreement on Implementation of Article VI of the GATT 1994 to competition disputes? — 11. The Alternative Solution: Rethinking the Basic Principles of Competition and Unfair Practices in International Trade. — 11.1. The Munich Proposal for a International Code of 1993. — 11.2. Trade, unfair practices and competition: a unique consistent trade-competition system?

(*) This paper appears in the Journal of World Trade, Vol. 32, No. 3, June 1998.

SECTION I

SHOULD INTERNATIONAL MULTILATERAL COOPERATION NOW BE EXTENDED
TO DEAL WITH RESTRICTIVE BUSINESS PRACTICES?1. *Multilateral versus Bilateral Cooperation.*

Following the successful conclusion of the Uruguay Round and the adoption of the Marrakech Agreements by a large number of States, the debate has proceeded as to how this new set of agreements governing international trade among contracting parties ("Members") might be further improved and extended. One of the questions which is again attracting the attention and interest both of trade institutions and of legal doctrine is, whether it would be appropriate to extend the scope of multilateral cooperation to deal with restrictive business practices. Now that the traditional government-imposed trade barriers have been largely reduced, it is commonly understood that restrictions of trade by private parties, on the one hand, and government action taken to circumvent *de facto* the prohibition against restricting trade (also by inducing restrictive practices), on the other, represent real threats to the effective realization of the objectives of the World Trade Organization ("WTO") and the Marrakech Agreements.

In fact, the need for some degree of international cooperation in the battle against restrictive business practices was being asserted long before the conclusion of the Uruguay Round, in particular by domestic anti-trust agencies. The question of the extraterritorial application and enforcement of competition regulations to bar practices occurring in one State but producing restrictive effects in another, is a long-standing problem, which dates back to the very inception of domestic anti-trust laws and their enforcement ⁽¹⁾.

(1) Among the many others, see R.Y. JENNINGS, *Extra territorial jurisdiction and the United States anti-trust law*, 33 B.Y.B. 1957, 146; BARNARD, *Extra territoriality and anti-trust law in the United States*, 6 ICLO 1963, 95; J-M. BISCHOFF & R. KOVAR, *L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la communauté*, Jour.Dr.Int'l 1975, 675; B. BARACK, *The Application of the Competition Rules of the European Economic Community to Enterprises and Arrangements External to the Common Market*, Kluwer, London-

However, when attempts to solve this problem by applying conflict of laws theory have been found unsatisfactory, the path of bilateral cooperation between enforcement agencies has been taken. The most recent bilateral agreements between the United States and Canada ⁽²⁾, Australia and New Zealand ⁽³⁾, and the United States and the European Community ⁽⁴⁾, which also contain new principles such as that of positive comity ⁽⁵⁾, are examples of this trend. Indeed, competition experts have often maintained that widespread bilateral cooperation is a proper and sufficient means to address international situations, and that it is to be preferred to multilateral cooperation ⁽⁶⁾.

So far, the debate on restrictive business practices in international trade has followed two different paths, the one pertaining to

The Hague-Boston 1981; C. J. OLMSTEAD (ed.), *Extra-territorial Application of Laws and Responses Thereto*, ESC Publ. Ltd., Oxford 1984; A. BIANCHI, *L'Applicazione Extraterritoriale dei controlli all'esportazione*, Cedam, Padua 1995; R. B. STAREK III, *International Aspects of Antitrust Enforcement*, 19/3 *Word Competition* (1996), 29.

(2) Canada-United States: Agreement regarding the application of their competition and deceptive marketing practices laws, done at Washington on 1st August 1995, 35 I.L.M. (1996), 309.

(3) Australia-New Zealand Closer Economic Relations Trade Agreement of 1990 (ANZCERTA).

(4) Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, done at Washington on 23 September 1991, 30 I.L.M. (1991), 1487 ("US/EC Cooperation Agreement"). See also E.C.O.J. 1995 No L 95/51.

(5) Art. V of the US/EC Cooperation Agreement provides that "if a Party believes that anti-competitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities" (V(2)). However, "nothing in this Article limits the discretion of the notified Party under its competition laws and enforcement policies as to whether or not to undertake enforcement activities with respect to the notified anti-competitive activities, or precludes the notifying Party from undertaking enforcement activities with respect to such anti-competitive activities" (V(4)).

(6) Among the many other contributions in this direction of these two authors, see D. Wood, "The Internationalization of Antitrust Law: Options for the Future", 44 *DePaul L. Rev.* (1995), 1289; J. I. Klein, "Anticipating the Millennium: International Antitrust Enforcement at the end of the Twentieth Century", speech presented at the Twenty-Fourth Annual Conference of the Fordham Corporate Law Institute, New York, 16/17 October 1997.

competition experts, who mainly focus on how to solve the conflicts of domestic anti-trust legislation and extraterritorial enforcement, and the other pertaining to international trade experts, who are naturally interested in the interaction between trade policy and competition policy, insofar as certain restrictive practices which are the subject of competition policy may also constitute a trade barrier. Although now that the debate is becoming more widespread, the partisans of bilateral cooperation tend to be seen as opposed to the partisans of multilateral cooperation within the WTO, their positions are in fact complementary, for two reasons.

First, problems of extraterritoriality or conflict of domestic laws are common to any branch of legislation, simply because acts occurring in one place do easily produce effects in another place. These can be dealt with unilaterally (for instance, by the use of the effects doctrine ⁽⁷⁾, or the negative comity standard ⁽⁸⁾) or through bilateral cooperation. In addition, anti-trust policies inherently protect competition within a certain relevant market, which may or may not coincide with domestic boundaries, thus again generating conflicts between authorities whose jurisdiction partially covers the same relevant market ⁽⁹⁾. Foreign and domestic competitors are not *per se* separate categories for anti-trust concern, either when enforcement agencies apply their domestic legislation internally or when they deal with international situations.

Secondly, international trade policy deals with barriers to market access and discrimination against foreign, *vis-à-vis* domestic,

(7) The effects doctrine makes it possible to assert jurisdiction over conduct occurring outside the territory of the relevant State when such conduct has a "direct, substantial and reasonably foreseeable effect" on that State's commerce (see the US Sherman Act and the Federal Trade Commission Act, as amended by Sections 402 and 403 of the Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No 97 290).

(8) This standard requires domestic authorities to refrain from enforcing their domestic competition laws where such enforcement would unduly interfere with the legitimate sovereign interests of another State. See also Art. VI of the US/EC Cooperation Agreement codifying this standard.

(9) See *Aerospatiale Alenia/De Havilland*, EC Commission decision of 2 October 1991, E.C.O.J. 1991, No. L 334/42; *Boeing/McDonnell Douglas*, EC Commission decision of 30 July 1997, E.C.O.J., 1997, No. L 336/16.

operators. These restrictions can be produced by private parties whose behaviour is aimed at foreclosing the market or sharing markets at an international level. Often, the restrictive practice is produced by a combination of public and private action (for instance when a government purposely omits to apply domestic antitrust rules to domestic operators or even actually encourages restrictive private behaviour, so as to protect its own domestic industry) ⁽¹⁰⁾. Two sets of actions may consequently be equally trade-restrictive: private anti-competitive behaviours and a combination of private and public action, in which the State has autonomous responsibility for the foreclosing effects.

In the trade context, the issue at stake is not the protection of competition *per se*, but still protection of foreign competitors from structural market barriers or restrictive behaviour by domestic operators. While government measures have traditionally been the focus of the WTO and of its predecessor GATT, private business restrictions are not generally covered by the Marrakech Agreements. Consequently, two different issues need to be addressed in this context: (i) whether foreclosing domestic policies are covered by any of the provisions of said agreements or whether there is any instrument within the WTO to caught foreclosing behaviours of Members, and (ii) whether the scope of the Marrakech Agreements should be extended to private business restrictions, and if so with what consequences for the entire set of agreements.

Leaving aside any direct analysis of issues related to extraterritoriality and conflict of laws in the application and enforcement of domestic competition regulations, this paper will attempt to analyse the role of the WTO in preventing restrictive business practices in international trade. In particular, it will be separately considered whether the current provisions of the Marrakech Agreements alone provide a sufficient legal basis to dissuade government action tending to structural market barriers against foreign operators or whether additional specific provisions should be inserted by way of amendment or addition; and whether and how the scope of the

(10) The question whether the omission to act can be equated to positive State action violating WTO rules will be discussed in the course of this paper.

Marrakech Agreements should be extended to cover private business restrictions.

2. *Legitimacy of International Cooperation within the WTO.*

2.1. *The Havana Charter.*

Chapter V of the Havana Charter of 1948 ⁽¹¹⁾ was devoted to Restrictive Business Practices, and by its terms requested each member State to take appropriate measures and to cooperate to prevent business practices on the part of private or public commercial enterprises affecting international trade which would restrict competition, limit access to markets, or foster monopolistic control, whenever such practices had harmful effects on the expansion of production or trade and would interfere with the achievement of any of the objectives listed in Article 1 of the Charter ⁽¹²⁾. In addition, the Charter provided for an investigation procedure to be carried out by the International Trade Organization ("ITO"), according to which the Organization was to have evaluated, upon a specific claim by any affected member, whether the alleged restrictive practice in fact had the effect of restricting competition, limiting access to markets or fostering monopolistic control. If the practice was proved to exist and to have restrictive effects, the Organization was to have had the power to request each member concerned to take "every possible remedial action" ⁽¹³⁾. The terms of the Charter expressly required members to take all possible measures, by legislation or otherwise, to ensure that private and public commercial enterprises would not engage in restrictive practices ⁽¹⁴⁾ and to enforce any national statute or decree directed towards preventing monopoly or restraint of trade ⁽¹⁵⁾.

(11) United Nations Conference on Trade and Employment held at Havana, Cuba, from November 21, 1947, to March 24, 1948, Final Act and Related Documents, E/CONF/2/78.

(12) Art. 46 Havana Charter.

(13) Art. 48.7 Havana Charter.

(14) Art. 50 Havana Charter.

(15) Art. 52 Havana Charter.

The Havana Charter was never adopted, and reports on the facts of those years indicate that the very existence in that Charter of Chapter V was one of the main reasons for States to refuse its adoption⁽¹⁶⁾. In subsequent attempts to extend the scope of the GATT rules to relate also to restrictive business practices, there has always been scepticism as to the appropriateness of including invasive rules on this matter. Indeed, the work of a group of experts appointed in 1958 to "study and make recommendations with regard to whether, to what extent if at all, and how the CONTRACTING PARTIES should undertake to deal with restrictive business practices in international trade"⁽¹⁷⁾ was concluded with a Decision of 18 November 1960 to the effect that "in present circumstances it would not be practicable for the CONTRACTING PARTIES to undertake any form of control of such practices nor to provide for investigations"⁽¹⁸⁾. The decision not to take any action beyond recommending bilateral or multilateral consultations whenever a contracting party so requested⁽¹⁹⁾, was taken in spite of the fact that contracting parties did indeed recognize that business practices which restrict competition in international trade may hamper the expansion of world trade, thereby frustrating the benefits achieved by tariff reduction and the removal of quantitative

(16) D. WOOD, *The Internationalization of Antitrust Law: Options for the Future*, 44 *DePaul L. Rev.* (1995), 1289: "it is important to remember that a key reason why the ITO never came into being, and why the US Congress in particular objected to the Havana Charter, was the feeling that the antitrust rules of Chapter V were not adequate for the United States (p. 1296)". *Contra*, W. DIEBOLD JR, *The End of the I.T.O.*, Princeton Essays in International Finance, No 16, 1952 (who affirms that the failure to establish the ITO stemmed from a number of factors in addition to competition policy provisions, "which hardly constituted a "make or break" issue": see R.B. Starek, *supra*).

(17) Resolution of 5 November 1958, BISD 7S/29.

(18) BISD 9S/28.

(19) "The CONTRACTING PARTIES,

Recommend that at the request of any contracting party a contracting party should enter into consultations on such practices on a bilateral or multilateral basis as appropriate. The party addressed should accord sympathetic consideration to and should afford adequate opportunity for consultations with the requesting party, with a view to reaching mutually satisfactory conclusions, and if it agrees that such harmful effects are present it should take such measures as it deems appropriate to eliminate these effects ...".

restrictions, and that international co-operation is needed to deal effectively with harmful restrictive practices in international trade.

It is clear from the 1960 Decision that the contracting parties agreed that they had to undertake to deal with these matters and that the GATT members were to be regarded as an appropriate and competent body to initiate action in this field ⁽²⁰⁾. However, as to the kind of action to be undertaken they could only agree on the need to encourage direct consultation between contracting parties. Yet, the refusal to implement more stringent tools seems to have been based on the fact that there was as yet no consensus among countries upon which such an agreement could be based, and countries did not have sufficient experience of action in this field to be able to devise an effective control procedure.

Although the failure of the Havana Charter and of subsequent efforts to establish common rules on restrictive business practices has often been seen as confirmation of the inappropriateness of any further attempts in this direction, there is a number of reasons for questioning the value of that conclusion.

The Havana Charter was an ambitious project to regulate international trade which includes, in addition to the GATT, not only the above described rules on restrictive business practices, but also provisions on employment and on industrial and general economic development and commodity policies, which would have been particularly invasive of States' domestic policies. Chapter V, and its Article 46 in particular, must be seen in this context. Article 46 would have prevented not only those practices that limited access to markets (which inherently restrain trade), but also those that were generically restrictive of competition or that would foster monopolistic control. Moreover, it is clear from the wording of the Article that the Organization would have had the power to evaluate not only whether a practice fell within the definition of *restrictive* under the criteria stated in paragraphs 2 and 3 of Article 46, but also whether, if so, such practice would have "harmful effects on the expansion of production or trade and interfere with the achievement of *any of the other objectives* set forth in Article 1". Finally, it was

(20) See also Report of the Group of Experts of 2 June 1960, BISD S9/170.

to have done this by way of a investigation which the wording of the Article indicates would amount to a sort of *de novo* judgment of the facts of the case.

In addition, the 1960 Decision explicitly recognized the need for some multilateral action in the field, and only refrained from taking any very invasive measures, not because such measures were inappropriate as a matter of principle, but because they would have been so under the circumstances ⁽²¹⁾. Consequently, it is necessary to consider whether the new order established by the WTO and the Marrakech Agreements modified the circumstances so as to permit an extension of the scope of multilateral cooperation to include the prevention of restrictive business practices, and in what way any new rules should possibly depart from the model of the Havana Charter.

2.2. *Objectives and scope of the WTO.*

In the GATT 1947 it was commonly recognized that one of the primary objectives of international trade rules is to create conditions of equal opportunities of competition for the products of different countries. The three principles of the most favoured nation, of national treatment and of the prohibition of quantitative restrictions embodied in the GATT 1947 were all aimed at the final objective of creating substantial equality of opportunities for goods irrespective of their origin. The 1990 *Oilseeds* Panel Report ⁽²²⁾, relating to a violation of Articles III:4 and XXIII:1(b) of the GATT 1947 by the European Community, confirms and reinforces this statement: "the CONTRACTING PARTIES have consistently interpreted the basic provisions of the General Agreement on restrictive trade measures as provisions establishing conditions of competition. (...) A previous Panel pointed out that Articles III and XI are to protect expectations of the CONTRACTING PARTIES as to the competitive relationship

(21) The Report of the Group of Experts so declares: "In fact, a premature attempt to do so could well prejudice future progress in this field" (par. 8).

(22) *European Economic Community, Payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins*, Panel Report adopted on 25 January 1990, BISD 37S/86.

between their products and those of other CONTRACTING PARTIES. (...) In the past Article XXIII:1(b) cases, the CONTRACTING PARTIES have adopted the same approach: their findings of nullification or impairment were based on a finding that the products for which a tariff concession had been granted were subjected to an adverse change in competitive conditions (par. 150)" (23). However, no specific reference of any kind was made in the GATT 1947 to adverse changes in competitive conditions due to structural market barriers, either when solely produced by government action, or when due to private conduct or to a combination of private and public action (24).

By contrast, the Marrakech Agreements contain some provisions specifically devoted to competition matters. According to Article XVII of the GATT 1994, Members undertake that, if they establish or maintain a State enterprise or grant an undertaking exclusive or special privileges, such (either public or private) undertaking is required to act in a manner consistent with the general principles of non discrimination prescribed by the Agreement (par. 1(a)). Paragraph 1(b) of Article XVII then provides that the provisions of subparagraph (a) must be understood to require that such

(23) This finding is confirmed by the Appellate Body Report in *Japan - Taxes on Alcoholic Beverages* of 4 October 1996: "The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III is to ensure that internal measures not be applied to imported or domestic products so as to afford protection to 'domestic production'. To this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products" (p. 16).

(24) In this regard, note that the question of access to the Japanese market in semi-conductors, raised by the US industry in 1986 was resolved through a bilateral Arrangement Concerning Trade in Semi-conductor Products (GATT document L/6076 of 6 November 1986) pursuant to which the US Government agreed to withdraw an anti-dumping investigation against semi-conductors produced by Japanese producers which had been initiated in the United States, in exchange for positive action by the Japanese Government to encourage Japanese customers to buy foreign products. The issue was thus solved outside the GATT 1947, following unilateral retaliatory measures by the United States. See the dispute further initiated by the European Community against the discriminatory effects produced by the said bilateral agreement, *infra*, Section II (*Japan - Trade in Semi-conductors*, BISD 35/116).

undertakings shall make purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the undertakings of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales. In addition, Members are required not to prevent any enterprise of any kind under their jurisdiction from acting in accordance with the said principles (par. 1(c)) ⁽²⁵⁾.

Equally, Article 11.1(b) of the Agreement on Safeguards prevents Members from "seeking, taking or maintaining any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side". These include actions taken unilaterally and actions under agreements, arrangements and understandings entered into by two or more Members. Moreover, paragraph 3 of the same Article extends the obligation of Members by prohibiting them from encouraging or supporting "the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1".

Article IX of the General Agreement on Trade in Services (GATS), the only Article expressly devoted to "Business Practices" as such, affirms that Members recognize that certain business practices of service suppliers (other than those mentioned in Article VIII) may restrain competition and thereby restrict trade in services. Consequently, Members undertake, at the request of any other Member, to enter into consultations with a view to eliminating such practices. The Member addressed must "accord full and sympathetic consideration to such a request and to cooperate through the supply

(25) The Preamble to the Agreement on Trade-Related Investment Measures ("TRIMS") states the general intention of the Members to promote the expansion and progressive liberalization of world trade and to facilitate investments across international frontiers *while ensuring free competition*. In addition, Article 9, which provides for revision of the Agreement within five years from its entry into force, specifically requires that the Council for Trade in Goods also consider at that time whether the Agreement should be complemented with provisions on competition policy.

of publicly available non-confidential information of relevance to the matter in question". The Member addressed must also "provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member". Article VIII:2 of the GATS provides that where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member must ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments ⁽²⁶⁾.

(26) It must finally be mentioned that rules on competition are also included in the Agreement on Trade-related Aspects of Intellectual Property Rights ("TRIPS"). However, provisions in this Agreement relate to *limits* that Members can domestically impose on the multilaterally agreed discipline on intellectual property rights, including domestic legislation on abuse of said rights or the resort to practices that unreasonably restrain trade (see for instance Articles 8 and 40). Yet, the principle is established in TRIPS that any such measures must be consistent with the provisions of the Agreement, and therefore must also respect the general principle of non discrimination therein embodied. See also E. Fox, *Trade, Competition, and Intellectual Property - TRIPS and its Antitrust Counterparts*, 29/3 *Vand. J. Transnat'l L.* (1996), 481.

Article 40 of TRIPS (which alone constitutes the whole of Section 8 on the Control of Anti-competitive Practices in Contractual Licences) deserves a specific reference because of its content:

"1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

3. Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member's laws and regulations on the subject matter of this Section, and which wishes to

Thus, the Marrakech Agreements do contain specific, albeit fragmentary, rules concerning competition. Although they probably do not amount to the imposition on Members of a direct and general duty (beyond the specific duties set out in the above rules) to ensure that no restrictive practices having adverse effects on trade are undertaken within their respective territories ⁽²⁷⁾, these do at least support the statement that Members should not use and apply their domestic anti-trust legislation, or structural market barriers, in such a way as to circumvent their general duty to guarantee equal competitive opportunities to any goods and/or services irrespective of their origin. In fact, Members recognize, not only in respect of services but also in respect of goods, and intellectual property rights, that restrictive business practices may impede trade and that consequently they should not permit that the *effet utile* of the Marrakech Agreements be frustrated, by means of restrictive practices and structural market foreclosure ⁽²⁸⁾. At least restrictions due to a

secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall cooperate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member.

4. A Member whose nationals or domiciliaries are subject to proceedings in another Member concerning alleged violation of that other Member's laws and regulations on the subject matter of this Section shall, upon request, be granted an opportunity for consultations by the other Member under the same conditions as those foreseen in paragraph 3."

This Article is interesting not only because it reaffirms the right to consultation of each Member whenever it considers that restrictive practices in other member countries may adversely affect trade, but also because it embodies a principle of positive comity in the event of violation of domestic anti-trust legislation that is similar to that embodied in the above-described US/EC Cooperation Agreement.

(27) See further discussion on this point in Section II.

(28) A different reading would deprive provisions such as Article IX of the GATS of any effective meaning. See Appellate Body Report in *United States - Standards for Reformulated and Conventional Gasoline*, 20 May 1996: "one of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An

combination of private and public action should therefore be open to challenge under the current rules of the WTO and it should no longer be possible to maintain that unilateral retaliatory action is permissible, in retaliation for alleged structural market barriers in another member State, merely because restrictive business practices are not covered by the Marrakech Agreements ⁽²⁹⁾.

Circumstances have thus changed in respect of the legal situation supporting the 1960 Decision in the sense that there is now express and general recognition in each of the areas covered by the Marrakech Agreements of the potential adverse effects of restrictive practices on trade and that Members have now undertaken a number of obligations in various areas to control such practices. Moreover, Article III.2 of the Agreement establishing the WTO, states that "the WTO *shall* provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement". Since restrictive business practices are dealt with, albeit fragmentarily, in the Marrakech Agreements, it would be logical for further multilateral negotiations to expand the existing rules on restrictive business practices into general obligations to be carried out primarily within the WTO.

2.3. *Changes in Members' political commitment.*

In addition, circumstances have changed not only from a legal viewpoint, but also in terms of Members' consciousness of the

interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility" (p. 23). Pursuant to Article 3.2 of the Disputes Settlement Understanding ("DSU"), the Marrakech Agreements must be interpreted in accordance with customary rules of interpretation of public international law, which also include the Vienna Convention. See further discussion on this point in Section II.

(29) This was the argument used by the United States to justify the 301 investigation launched against the Japanese aftermarket for replacement auto parts, whose structure was asserted to foreclose US entries, in the well-known auto and auto-parts dispute of 1995 which was settled before a dispute settlement procedure pursuant to the DSU had been initiated. See also T. Abels, "The World Trade Organization's First Test: the United States/Japan Auto Dispute", 44/2 *UCLA L. Rev.* (1996), 467.

relevance of restrictive business practices and the appropriateness of addressing them within the WTO. Some of the most recent disputes, certain of which are still pending, have involved questions of market structure in certain countries allegedly restricting market access. The latest case concerns a complaint that the US company Kodak originally filed in 1995 with the US government under Article 301 of the US Trade Act, to the effect first, that the Japanese company Fuji had put in place various restrictive practices in its domestic market and secondly, that the Japanese government had favoured this behaviour by failing properly to apply its domestic anti-trust legislation ⁽³⁰⁾. Following this complaint, the United States had requested consultations under Article 4 of the Dispute Settlement Understanding ("DSU") and Article XXIII:1 of the GATT regarding laws, regulations and requirements of the Government of Japan affecting the distribution, offering for sale, and internal sale of imported consumer photographic film and paper, including: "liberalization countermeasures", distribution guidelines and related measures to restrict distribution channels for foreign products (Art. III GATT) ⁽³¹⁾.

Whereas a similar dispute which arose in 1990 concerning the semi-conductors market between the same parties was concluded with a bilateral agreement outside the GATT 1947 rules ⁽³²⁾, in this case it appears that the Members addressed the issue within the WTO disputes mechanism. Likewise, in the 1995 dispute between the United States and Japan on auto and auto-parts, notwithstanding threats of unilateral measures, in the end each party initiated a complaint of unfair trade practices against the other within the WTO system. Therefore, not only are formal disputes concerning

(30) Kodak is reported having alleged that these behaviours amount to restrictions of access in the Japanese market for consumer photographic film and paper; see G. HORLIK & Y.K. KIM, *Private Remedies for Private Anti-Competitive Barriers to Trade: the Kodak-Fuji Example*, *Int.Bus.Lawyer*, Nov. 1996, 474.

(31) E.U. PETERSMANN, *The GATT/WTO Dispute Settlement System*, Kluwer, London-The Hague-Boston 1997, p. 221.

(32) As mentioned above, the measures to implement the Agreement reached by the parties were claimed to be in violation of GATT rules by the European Community. See *infra*, Section II, *Japan - Trade in Semi-conductors*, BISD 35/116.

structural market barriers and the alleged misuse of competition rules numerically increasing, but they are more often conducted under the aegis of the WTO. Finally, and most importantly, it is reported that in the latest Kodak/Fuji case the United States, for the first time in the history of the GATT and the WTO since 1960, also requested consultations with Japan pursuant to the 1960 Decision on restrictive business practices ⁽³³⁾.

These latest disputes, together with the frequent invocation by some States of the principle of the extraterritoriality of competition laws in order to catch conduct in foreign markets, for the primary purpose of protecting their exporters rather than their consumers (i.e., not only when effects occur in their internal markets but also when they occur outside it, for instance by the foreclosure of foreign markets) ⁽³⁴⁾ — serve to confirm the relevance of this issue, and indicate a change in circumstances and in Members' political understanding of the need for reinforcing and expanding multilateral cooperation in this field within the WTO.

3. *Limits of Action Against Restrictive Practices within the WTO.*

Once it is accepted that, on the one hand, the current rules of the Marrakech Agreements of themselves provide a sufficient legal basis to dissuade government action leading to market foreclosure and, on the other hand, there is room for extending the scope of the Marrakech Agreements to private restrictive business practices, it is

(33) E.U. PETERSMANN, *The GATT/WTO Dispute Settlement System*, Kluwer, London-The Hague-Boston 1997, p. 221. According to Annex 1A incorporating the GATT 1994 into the WTO Agreement, the GATT 1994 consists also of the decisions of the Contracting Parties to GATT 1947 (1.(b)(iv)). The 1960 Decision must therefore be considered to be still in force. In this regard, see the Appellate Body Report in *Japan - Taxes on Alcoholic Beverages*, adopted on 4 October 1996, where, in the course of the analysis of the legal status of adopted panel reports, it is stated that decisions to adopt panel reports under Article XXIII of the GATT 1947 were different from joint action by the Contracting Parties under Article XXV of the GATT 1947, which implies that the latter decisions (which also include the 1960 Decision) do constitute "other decisions of the Contracting Parties to GATT 1947" for the purposes of paragraph 1(b)(iv).

(34) Y. OIHARA, *The New US Policy on the Extraterritorial Application of Antitrust Laws and Japan's Response*, 17/3 *World Competition* (1994), 49.

however necessary to define the scope both of the existing and of the prospective rules. The difficulty is that competition rules embody domestic policies relating to the organization of the States' internal markets, which are in the domain of State sovereignty. Indeed, with the exception only of the rules on intellectual property rights and a few others, Members have agreed to limit their sovereignty only to the extent that their domestic policies could jeopardize international trade ⁽³⁵⁾. Although it is true that this refers not only to domestic measures which directly limit imports or exports, but also to domestic measures which indirectly do so, a much more careful evaluation must be made in the latter case. This is particularly important when the issue at stake is not plain discrimination by internal regulation, but *de facto* foreclosure of the market, due for the most part to market structure.

Since it is commonly recognized that the main objective of the Marrakech Agreements is to ensure equal opportunities of competition to foreign and to domestic goods, it follows that — in order to respect the sovereignty of States in the regulation of their internal markets — only those practices which restrict market access should be banned pursuant to the WTO rules. Once a foreign operator is put in a position potentially to compete on equal terms with domestic enterprises, no additional obligation should be imposed on the Member. This means that any foreclosure cartels, expressly aimed at keeping other operators out of the market, and any price or market sharing cartels, which have the same effect, should obviously be banned; but it is less evident that a specific distribution system (even when based on exclusivity arrangements) must be automatically banned, unless it is positively proved that it has the object or effect of foreclosing the market (as opposed to merely making entry more costly but still economically feasible).

While any prospective action by the WTO to oblige Members

(35) "Members of the WTO are free to pursue their own domestic goals through internal taxation or regulation so long as they do not do so in a way that violates Article III or any of the other commitments they have made in the WTO Agreement", Appellate Body Report in *Japan - Alcoholic Beverages*, of 4 October 1996, p. 17.

domestically to prohibit restrictive practices should be as non-invasive as possible and be based solely on the criterion of market access, a different set of principles should apply for government action leading to structural market foreclosure to circumvent obligations undertaken by Members under the Marrakech Agreements. Indeed, these situations should be solved under the principle of impairment of the *effet utile* of the WTO Agreement. The fact that all the Marrakech Agreements are regarded as constituting a single undertaking and forming a single body of rules ⁽³⁶⁾, and the fact that this *unicum* should be interpreted on the basis of customary interpretation of public international law, which includes interpreting treaties in good faith and in such a way as not to deprive rules of any meaning or reducing them to redundancy or inutility ⁽³⁷⁾, should make it possible to build up a fully-fledged theory of the *effet utile* of the WTO Agreement to frustrate any attempts at circumvention. As will be shown more fully in the following pages, non-violation complaints could be the means of achieving this goal, if they are used correctly and dealt with partially differing from the way they have been dealt with under the GATT 1947.

SECTION II

DE IURE CONDITO: EXISTING INSTRUMENTS WITHIN THE WTO THAT COULD BE USED TO PREVENT GOVERNMENT ACTION

4. *Recourse to Traditional GATT Instruments to Prevent Discrimination by way of Internal Measures.*

In order to prevent State acts leading to anti-competitive discrimination in violation of GATT principles, recourse has tradition-

(36) See description of the WTO as an integrated system in Appellate Body Report in *Brazil - Measures affecting Desiccated Coconut*, of 21 February 1997, p. 11 ss.

(37) See discussion in Section II on international customary law and the Vienna Convention on the Law of Treaties of 1969 in relation to the interpretation of treaties in good faith and without making any of their rules redundant or deprived of any meaning.

ally been had to either Article III or Article XI of the GATT. Article III prohibits the imposition of all internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and of all internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions insofar as their imposition affords protection to domestic production. Under Article III.4 "the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

Article III.4 covers situations in which anti-competitive discrimination is produced either directly or indirectly by internal regulations generally applying to all goods ⁽³⁸⁾. In *United States - Measures affecting Alcoholic and Malt Beverages* ⁽³⁹⁾, the measures complained of were, *inter alia*, requirements in certain US States that imported beer and wine be sold only through wholesalers and that imported beer and wine be transported only by common carrier, neither of which requirements applied to the like in-State products, and restrictions on points of sale, distribution and labelling based on the alcohol content of beer. These were all found to represent direct discrimination against foreign products since they effectively barred them from enjoying equally favourable competitive opportunities (par. 5.30 and 5.31).

In *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* ⁽⁴⁰⁾, however, there was a

(38) The Note Ad Article III states that a regulation is subject to the said Article when it applies to an imported product and to the like domestic product. In addition, "the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given", *Italian Discrimination against Imported Agricultural Machinery*, BISD 7S/60, Panel adopted on 23 October 1958, par. 11.

(39) Report adopted on 19 June 1992, BISD 39S/206.

(40) Report adopted on 18 February 1992, BISD 39S/27.

finding of indirect discrimination. A series of measures limiting the access of imported beer to points of sale and levying import mark-ups, and imposing a minimum price requirement on beer, were claimed to violate Article III.4. The Panel concluded that the words 'treatment no less favourable' in paragraph 4 call for an effective equality of opportunities for imported products in respect of the application of regulations affecting the internal sale of products. Although this requirement is normally met by applying to imported products legal provisions identical to those applied to domestic products, there may be cases where the application of formally identical legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded to them was in fact no less favourable. In the specific case, the Panel found that minimum prices applied equally to imported and domestic beer did not necessarily accord equal conditions to imported and domestic beer. Whenever they prevented imported beer from being supplied at a price below that of domestic beer, *de facto* they accorded less favourable treatment to imported beer than that accorded to domestic beer (par. 5.30).

Article XI, on the other hand, provides that "no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party". This wording alone makes it clear that whilst Article III applies to regulations that relate generally to domestic and imported products, Article XI applies only to import or export measures ⁽⁴¹⁾. Before the

(41) "The Panel further noted that the United States considered the minimum prices to be inconsistent with Article XI:1 of the General Agreement because they restricted the importation of beer, while Canada considered the minimum prices to be covered by, and consistent with, Article III:4 of the General Agreement because they were applied equally to both imported and domestic beer. The Panel first examined whether the minimum prices fell under Article XI:1 or Article III:4.

implementation of Article 11.1(b) of the Agreement on Safeguards this was the only instrument to ban export measures that were apt to jeopardize competition in foreign markets, such as voluntary export restraints or orderly marketing arrangements of the kind judged in the *Semi-conductors* dispute ⁽⁴²⁾. In that case, the Panel found, *inter alia*, that certain Japanese measures applying to exports of semi-conductors contravened Article XI because they constituted restrictions on the sale for export of semi-conductors at prices below company-specific costs, through measures other than duties, taxes or charges. In particular, the Panel stated that "the CONTRACTING PARTIES had decided in a previous case that the import regulation allowing the import of a product in principle, but not below a minimum price level, constituted a restriction on importation within the meaning of Article XI:1 (BISD 25S/99). The Panel considered that the principle applied in that case to restrictions on imports of goods below certain prices was equally applicable to restrictions on exports below certain prices" (par. 105).

In addition, since the wording of Article XI:1 refers to State *measures* generically, it seems appropriate to maintain that it also applies to authority or agency decisions (such as those of competition authorities) implementing domestic law.

At first sight, it appears that Article III.4 and Article XI:1 would cover a wide range of situations where market access is at stake. However, although it is correct to affirm that a number of specific cases relevant to the restrictive business practices could actually be also covered by these Articles, this would be so only when clear discrimination against foreign products can be shown. However, as has already been briefly mentioned, competition policies *per se* are

The Panel noted that according to the Note Ad Article III a regulation is subject to the provisions of Article III if it 'applies to an imported product and to the like domestic product' even if it is 'enforced in case of the imported product at the time or point of importation'. The Panel found that, as the minimum prices were applied to both imported and domestic beer, they fall, according to this Note, under Article III", *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, BISD 39S/27, par. 5.27 and 5.28.

(42) *Japan, Trade in Semi-conductors*, Panel adopted on 4 May 1988, BISD 35S/116.

not intended to discriminate between domestic and foreign operators; and indeed, the real issue at stake in this context is precisely that the restrictive effect on trade is not produced by direct discrimination against foreign products or services but by market foreclosure or the mere structure of the market. Foreclosure *vis-à-vis* new entrants (which is a competition issue) becomes also a matter of trade policy concern because it automatically also produces a barrier to market access (which is a trade issue). Thus, these two Articles do not adequately cover the issue of market foreclosure.

5. *Business Practices in Services.*

As mentioned above, Article IX of the GATS concerns business practices of service suppliers restricting trade. However, paragraph 1 of this Article does not contain mandatory rules, since it only states that Members *recognize* that certain (private) business practices may be restrictive. Indeed, its language closely resembles that of Article III:1 of GATT ⁽⁴³⁾, which is also non-mandatory, while containing general principles to inform the specific obligations contained in other paragraphs of the same Article.

In *Japan-Taxes on Alcoholic Beverages* ⁽⁴⁴⁾ it is stated that: "The terms of Article III must be given their ordinary meaning — in their context and in the light of the overall object and purpose of the WTO Agreements. Thus, the words actually used in the Article provide the basis for an interpretation that must give meaning and effect to all terms. The proper interpretation of the Article is, first of all, a textual interpretation. Consequently, the Panel is correct in seeing a distinction between Article III:1, which "contains general principles", and Article III:2, which "provides for specific obligations regarding internal taxes and internal charges". Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. This general principle informs the rest of Article III. The purpose of Article III:1 is to establish this general principle as a guide to

(43) "The contracting parties *recognize that* internal taxes ...".

(44) Report adopted on 4 October 1996.

understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of words actually used in the texts of those paragraphs. In short, Article III:1 constitutes part of the context of Article III:2, in the same way that it constitutes part of the context of each of the other paragraphs in Article III. Any other reading of Article III would have the effect of rendering the words of Article III:1 meaningless, thereby violating the fundamental principle of effectiveness in treaty interpretation" (p. 18) ⁽⁴⁵⁾.

Accordingly, Article IX of GATS does not have a direct prescriptive function. Like Article III:1 of GATT, it should serve positively to inform the content of all the other provisions of GATS. This interpretation should not be weakened by the fact that the second paragraph of this Article makes consultation mandatory whenever one Member believes that restrictive practices in another Member are restricting trade and requests consultations. Paragraph 1 cannot have the sole meaning of permitting consultations under Paragraph 2, since this opportunity is anyhow granted to Members by Article 4.2 of the DSU ⁽⁴⁶⁾. A different interpretation would thus deprive Article IX, first paragraph of any meaning.

It is, however, also arguable that no direct mandatory meaning can possibly be found in Article IX:1 of GATS because it is not sufficiently specific in identifying which practices can in fact be restrictive. Indeed, Article IX states that *certain* business practices (other than those falling under Article VIII) may restrain competi-

(45) Note, however, the *United States - Standards for Reformulated and Conventional Gasoline* Panel Report adopted on 29 January 1996: "The panel (Malt Beverages, BISD 39S/206) had concluded that because Article III:1 is a more general provision than either Article III:2 or III:4, it would not be appropriate for the Panel to consider (the complainant's) Article III:1 allegations to the extent that the Panel were to find (the respondent's) measures to be inconsistent with the more specific provisions of Articles III:2 and III:4. The present Panel agreed with this reasoning (par. 6.17)".

(46) "Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former".

tion and thereby restrict trade. Yet, since the restrictive effects of business practices cannot be defined in the abstract, but need a case-by-case analysis of the market which they affect, it is also compulsory for Members, in cases which are not contemplated by other provisions of the Agreement such as Article VIII of the GATS on Monopolies and Exclusive Service Suppliers, to build up a case and consider the actual context in which the allegedly restrictive practice would operate. This is also the reason why Article IX:2 expressly requires an exchange of all relevant non-confidential information between the Members taking part in a consultation under this provision. However, there is no doubt that the specific purpose of Article IX is to affirm that the very fact that certain practices are restrictive of competition implies that they may restrict international trade and that this informs the content of all other provisions of the GATS.

6. *Nullification or Impairment.*

6.1. *The WTO Agreement as an integrated system and the impairment of its effet utile.*

Indeed, Article IX of the GATS is not isolated. As has been illustrated above, other provisions in various of the Marrakech Agreements refer in effect to restrictive business practices. In the first place, a particular role is played by Article 11 of the Agreement on Safeguards. Indeed, most restrictions produced by a combination of private and public measures are the results of unilateral State action aimed at protecting domestic industry from outside competition. However, the preamble to the Agreement on Safeguards expressly affirms that there is a need to re-establish multilateral control over safeguards and to eliminate measures that escape such control. In addition, Members recognize “the importance of *structural adjustment and the need to enhance rather than limit competition in international markets*”. It is therefore recognized that structural market barriers are a restriction of trade that Members are trying to defeat by way of the provisions in the Agreement on Safeguards.

In this context, it is of the utmost interest to find a provision like Article 11, which expressly bans those government practices, either unilateral or joint, which have been shown to be the most evident tools for artificially regulating international competition ⁽⁴⁷⁾. In addition, the fact that paragraph 3 of Article 11 expressly forbids Members from encouraging or supporting private practices leading to the same foreclosing results as government safeguard measures, is undeniable evidence of the emergence and common acceptance by Members of the obligation not to operate or by any means support structural market foreclosure.

Of course, Article 11 of the Agreement on Safeguards only refers to direct import or export foreclosure, whilst some of the most recent claims (Kodak/Fuji case or all the past discussion on the Japanese *keiretsu* system) ⁽⁴⁸⁾ go further to complain of the actual structure of the internal market. Although too much invasion of Members' internal market structure should be severely criticized and certainly not encouraged, the possibility cannot be excluded, from a theoretical point of view, that even purely internal measures could foreclose markets. For these cases, recourse should be had to Article XXIII:1(b) or (c) of the GATT or to its counterpart Article XXIII:3 of GATS.

Indeed, as has been briefly mentioned in Section I above, a combined reading of Article IX of GATS, Article 11 of the Safeguards Agreement, Article 40 of TRIPS and the 1960 Decision under the GATT could provide a legal basis for affirming that

(47) Note 4 to Article 11.1(b) is also of special guidance, since it lists as examples of "similar" government "measures" to voluntary export restraints and orderly marketing arrangements, "export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection", basically reflecting all the practices contested in the disputes concerning semi-conductors and auto and auto-parts which have been discussed above. In addition, the fact that compulsory import cartels are included eliminates an evident escape-measure: most import or export cartels escape the application of anti-trust legislation under the doctrine of Act of State, clearing from liability those operators who acted in violation of competition rules because they were required to do so by government action. Members are now held responsible for these practices.

(48) A. HELOU, *The Nature and Competitiveness of Japan's Keiretsu*, 25 *J. World Trade Law* (1991), 99.

Members must not permit that the *effet utile* of the Marrakech Agreements be impaired by restrictive practices and structural market foreclosure. Infringement of this principle does not constitute a violation of a direct obligation of Members, except for cases directly covered by one of the measures which expressly prohibit specific practices, but it does constitute a frustration of *the benefits that Members could reasonably have expected to accrue under a specific commitment of another Member as a result of the application of any measure which does not conflict with any specific provision* of the Marrakech Agreements, to use the wording of Article XXIII.3 of the GATS.

The writer is aware that this combined reading of Articles of different Marrakech Agreements could be criticised as not conforming with the traditional interpretation of States' obligations under international treaties, according to which limitations of States' sovereign powers should always be applied restrictively ⁽⁴⁹⁾. However, it is firmly believed that this interpretation is supported by the letter and the spirit of the WTO Agreement, combining all the Marrakech Agreements as an unique, consistent and integrated undertaking ⁽⁵⁰⁾. In addition, one of the major novelties of the WTO

(49) This traditional interpretation has however been criticized by some legal doctrine: see for instance B. CONFORTI, *Diritto Internazionale*, Editoriale Scientifica, Naples 1987 (p. 99). In addition, what has been stated in the previous pages and the conceptual distinction that had been drawn between application of the nullification and impairment provision, on the one hand, and extension of Members rights and obligations under the WTO rules, on the other hand, should at least prevent criticism for inconsistency with Article 3.2 of the DSU, according to which "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".

(50) "The WTO is fundamentally different from the GATT system which preceded it. The previous system was made up of several agreements, understandings and legal instruments. Each of these major agreements was a treaty with different membership, an independent governing body and a separate dispute settlement mechanism. ... Unlike the previous GATT system, the WTO Agreement is a single treaty instrument which was accepted by the WTO Members as a "single undertaking". Article II:2 of the WTO Agreement provides that the Multilateral Trade Agreements in Annexes 1, 2 and 3 are "integral parts" of the WTO Agreement, binding on all Members. ... The single undertaking is further reflected in the provisions of the WTO Agreement dealing with original membership, accession, non-application of the Multilateral Trade Agreements between particular

Agreement is that a single body is responsible for the enforcement of all Agreements. Consequently, it is to be expected that the Appellate Body, while fully respecting the specificity of each Agreement and always bearing in mind the letter of each specific provision, will establish a common pattern of consistent interpretation in considering disputes under its review and that in judging the same facts under different Agreements contemporaneously, it will always give preference to an interpretation which does not deprive other provisions in other Agreements of any effective meaning. Although it is too early in time to see if Appellate Body's actual reports measure up to this expectation, it is worth noting that hitherto the attempt has always been made to interpret Members' obligations in a overall consistent way, often also referring to readings of other provisions in other Agreements forming the WTO ⁽⁵¹⁾.

In addition, since one of the criteria of interpretation set out in Article 31 of the Vienna Convention is good faith, a legal basis could be found in that article, as well as in the above mentioned WTO provisions in which Members recognize that restrictive business practices and market foreclosure restrict trade, for the contention that the general expectation of Members that equality of competitive conditions be maintained, also entails that no restrictive business practices or market foreclosure must be maintained or supported by contracting States ⁽⁵²⁾. Indeed, as already stated, in the author's

Members, acceptance of the WTO Agreement, and withdrawal from it. Within this framework, all WTO Members are bound by all the rights and obligations in the WTO Agreements and its Annexes 1, 2 and 3.", Appellate Body Report in *Brazil - Measures affecting Desiccated Coconut*, of 21 February 1997, p. 12.

(51) See in particular the analysis in *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, Report adopted on 10 February 1997 and in *Brazil - Measures affecting Desiccated Coconut*, of 21 February 1997. See also M. Matsushita, currently a member of the WTO Appellate Body: "There may be concern that the international community is not ready for this advanced dispute settlement process and thus, this new process will not work effectively. ... However, in the globalized economy of today, it is necessary to maintain a stable legal order in the world trade. Accordingly, a rule oriented mechanism for settling trade disputes is essential both in the domestic economy and at the international level" (M. MATSUSHITA, *Competition Law and Policy in the Context of the WTO System*, 44 *DePaul L. Rev.* (1995), 1097).

(52) Direct reference is hereby made to Article 31 of the Vienna Convention

judgment this would be the only possible interpretation not to deprive Article IX of the GATS and the 1960 Decision under the GATT, as well as the other provisions in the Marrakech Agreements expressly recognizing that restrictive practices frustrate trade, of any effective meaning.

Indeed, the maintenance in the WTO Agreement of Article XXIII:1(b) and (c) of the GATT and the repetition of their content in Article XXIII.3 of the GATS show that the nullification and impairment provisions still play a role within the new system. On the other hand, if consistency has to support legal certainty to the benefit of the integrated new order, rules to guarantee the closing of the system should indeed play a fundamental role in securing good faith, security and predictability. It is beyond the scope of this paper to analyse the features or the application of these provisions. However, although it is right to be concerned lest their uses should be too unpredictable and far-reaching, provisions such as these have a role that cannot be underestimated in the advancement and progress of the whole system. As stated by the Appellate Body in *Japan - Taxes on Alcoholic Beverages* (53), "WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless

in the light of the repeated and continuous direct reference made to this Convention by the Appellate Body in its reports as containing certain principles of customary law, which are thus generally applicable even to States which did not adhere to it. However, since it seems to be commonly accepted that Article 31 is a rule of customary law which the Convention only re-states (see Article 4 of the Convention and the United States declaration of 12 September 1980 to this extent, *AJIL* 1981, 147), the principles therein affirmed should be regarded achieving general scope and application. Whilst it is outside the scope of this paper to discuss the concurrence and hierarchy of the criteria listed in Article 31 of the Vienna Convention to interpret treaty rules, it should be noted that the Appellate Body frequently refers to the principle of good faith and the need not to deprive WTO rules of any meaning or to make them redundant. This clear persistence on affirming these two principles among the many others contained in the Vienna Convention, together with the seemingly evident intention of the Appellate Body repeatedly to affirm the unity of the WTO Agreement and its fundamental differentiation from its predecessor GATT system may indeed be a first sign of a more general attempt to build up a rule oriented mechanism to be consistently applied, which bears out the author's reconstruction.

(53) Report adopted on 4 October 1996.

and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the security and predictability' sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system" (p. 34). What but an appropriate use of the nullification and impairment provisions could serve this purpose best?

However, it should be always clear that in evaluating restraints produced by structural market foreclosure a clear-cut line should be drawn and self-restraint should be used by the bodies in charge of the dispute settlement system: a clear case should be shown that foreclosure indeed exists to the detriment of foreign entrants. The author would have serious doubts for instance, as to whether a close distribution system could suffice to justify intervention. In this context, it is interesting to consider the EC *Langnese-Igloo* case⁽⁵⁴⁾, where foreclosure of the German ice-cream market was found, on the basis of the fact that the only two operators in that market had each autonomously established a distribution system which had the result of making it almost impossible for a potential new entrant to market its products in Germany. In that case, foreclosure was proved, on the basis of tying agreements which basically obliged retailers to use refrigerators provided by the supplier only for its own products, so as *de facto* to prevent other producers from supplying the same retailers, who were not in a position physically to locate two refrigerators in their premises⁽⁵⁵⁾. However, the

(54) Case T-7/93, *Langnese-Igloo GmbH v. Commission*, judgment of 8 June 1995, ECR 1995, II-1533.

(55) "As to whether the exclusive purchasing agreements fall within the prohibition contained in Article 85(1) of the Treaty, it is appropriate, according to case-law, to consider whether, taken together, all the similar agreements entered into in the relevant market and the other features of the economic and legal context of the agreements at issue show that those agreements cumulatively have *the effect of denying access to that market for new domestic and foreign competitors* (par. 106, emphasis added).

It is also apparent from the documents before the Court that, in the traditional trade, there are numerous individual retailers whose average turnover is rather low. The establishment of a *profitable distribution system* therefore presupposes that a

question should be left open whether in similar cases the new foreign entrant should simply be guaranteed potentially equal treatment on the German market or whether it has the right to enter the market using the usual marketing schemes or facilities it is accustomed to use in other markets.

6.2. *Main features of nullification and impairment provisions.*

It must, however, be admitted that Article XXIII:1(b) of the GATT has been used by claimants and applied by Panels under very limited circumstances. In particular, it has been considered to apply in principle where it has been found that competitive benefits, which the complainant could have reasonably expected to enjoy under agreed tariff concessions, had been nullified or impaired by unforeseen trade measures. A two-fold test of reasonable expectation and unforeseeable impairing measures had thus to be met in order to apply the Article. In practice, Panels have always applied it when the claiming party could on the evidence be reasonably presumed to have believed at the time of the tariff concession that the other Member would not nullify the effect of that concession through a measure directly affecting the specific concession, such as the implementation of a subsidy for the benefit of a like domestic product that was treated during the negotiations leading to the tariff concession as strictly linked with the product that was to be the subject of a tariff reduction or the like ⁽⁵⁶⁾. In other words, Article XXIII:1(b) has been always applied with evident and stringent self-restraint. Whilst self-restraint should be maintained in the implementation of this Article, in order to use it in the new context of the WTO some of these standards of application should probably be adapted to the new circumstances. For instance, Members' expectations should not be confined to tariff concessions (which standard does not in fact derive from the letter of the Article) ⁽⁵⁷⁾, also to make the applica-

new competitor must have a large number of retailers concentrated within a specified geographical area ... (par. 110)".

(56) *Australia - Subsidy on ammonium sulphate*, adopted on 3 April 1950, BISD II/188.

(57) *In United States - Restrictions on the importation of sugar and sugar-*

tion of Article XXIII:1(b) of the GATT consistent with the letter of Article XXIII.3 of the GATS.

Alternatively, Article XXIII:1(c) of the GATT could be used to affirm that the benefit was impaired by the existence of "any other situation". However, since this Article, no doubt because of its wideness and generality, has never been applied, it is impossible to qualify its implementation. It should, however, be noted that in the current dispute between the United States and Japan on photographic films and paper the United States are reported as having also claimed violation of this Article.

7. *The Inherent Limitations of Current WTO Measures.*

Of course, all these provisions would provide a sufficient legal basis to remedy market foreclosure only in cases where autonomous State responsibility is proved. Foreclosure produced exclusively by private business practices could not be prevented under current WTO provisions, save for those particular cases where Members have the obligation under one of the specific provisions of the Marrakech Agreements to ensure that private undertakings will not perpetrate certain restrictive practices.

Nor should this result be achieved by means of an unreasonable extension of the meaning of State influence on private acts. In the *Semi-conductors* dispute ⁽⁵⁸⁾, a wide definition of government guidance is given. In order to determine the level of government involvement necessary to make the State liable for a specific measure under the GATT rules, the Panel declared it had to consider whether two essential criteria were satisfied: "First, there were reasonable grounds to believe that sufficient incentives or disincentives existed for non-mandatory measures to take effect. Second, the operation of

containing products (BISD 37S/228) the Panel maintained that Article XXIII:1(b) does not exclude claims of nullification or impairment based on GATT provisions other than Article II.

(58) *Japan, Trade in Semi-conductors*, Panel adopted on 4 May 1988, BISD 35S/116.

the measures to restrict export of semi-conductors at prices below company-specific costs was essentially dependent on Government action or intervention. The Panel considered each of these two criteria in turn. The Panel considered that if these two criteria were met, the measures would be operating in a manner equivalent to mandatory requirements such that the difference between the measures and mandatory requirements was only one of form and not of substance" (par. 109).

However, this wide definition, in the first place, is given under Article XI:1 of GATT, where reference is made to State "measures" and not merely to laws or regulations, which would in principle have left no room for a criterion of substance for detecting acts of State ⁽⁵⁹⁾, and, in the second place, it is justified by the facts of the case, where non mandatory acts were accompanied by a whole series of other binding acts so as to create a real administrative system to control exports ⁽⁶⁰⁾. This conclusion should in particular apply in the context of Article XXIII:1(b), where the self-restraint which has been claimed in the above pages should consist in limiting the application of this provision strictly to cases where autonomous State accountability is positively established. This should be af-

(59) "In this respect the Panel noted that Article XI:1, *unlike other provisions of the General Agreement*, did not refer to laws or regulations..." (par. 106).

(60) "All these factors led the Panel to conclude that an administrative structure had been created by the Government of Japan which operated to exert maximum possible pressure on the private sector to cease exporting at prices below company-specific costs. This was exercised through such measures as repeated direct request by MITI, combined with the statutory requirement for exporters to submit information on export prices, the systematic monitoring of company and product-specific costs and export prices and the institution of the supply and demand forecasts mechanism and its utilization in a manner to directly influence the behaviour of private companies. These measures operated furthermore to facilitate strong peer pressure to comply with requests by MITI and at the same time to foster a climate of uncertainty as to the circumstances under which their exports could take place. The Panel considered that the complex of measures exhibited the rationale as well as the essential elements of a formal system of export control. The only distinction in this case was the absence of formal legally binding obligations in respect of exportation or sale for export of semi-conductors. However, the Panel concluded that this amounted to a difference in form rather than substance because the measures were operated in a manner equivalent to mandatory requirements" (par. 117).

firmed regardless of the fact that this Article also generically refers to *State measures*.

This conclusion would also lead to the parallel consequence that under the current set of rules Members could not be prevented from simply omitting to apply their domestic anti-trust legislation (when they have one!) or for applying it loosely. As mentioned above, the rules on competition currently inserted in the Marrakech Agreements do not amount to a direct and general duty upon Members to ensure that no restrictive practice having adverse effects on trade is undertaken within their territories (which would found State liability in the event of omission), but only support the statement that Members should not use and apply their domestic legislation or structural market barriers in such a way as to circumvent the duty to guarantee equal competitive opportunities to any goods and/or services irrespective of their origin. The contention is therefore maintained, that only positive acts (and not acts of omission) by Members can be prevented under the nullification and impairment provisions in this context.

Equally, in the absence of a conventional duty of Members to prevent private restrictive business practices, it is very difficult to assert that the State is liable for the independent action of private entities on the basis of general international law. Indeed, back in the High Middle Ages the theory of "group liability" gained some acceptance in German legal doctrine, according to which the social community to which a single entity belongs should be held automatically liable for the acts of its members ⁽⁶¹⁾. However, this doctrine was quickly abandoned on the basis that State liability could only arise for violation of international obligations, which by definition only apply to States and consequently could not be infringed by private action ⁽⁶²⁾. And even more recent attempts to reconstruct the accountability of the State of origin for the indepen-

(61) This theory has been revisited by V. Arangio-Ruiz, *Gli enti soggetti dell'ordinamento internazionale*, Giuffrè, Milan 1951, p. 365 (in particular, footnote 468).

(62) See B. CONFORTI, *Diritto Internazionale*, Editoriale Scientifica, Naples 1987 (p. 336).

dent acts of private entities in third countries as engaging the vicarious liability of the State, would only apply in cases of infringement of interests protected by customary international law ⁽⁶³⁾, whereas damage produced by the mere fact that the private entity is economically powerful or able to benefit from States' differing internal policies has been argued not to engage State liability ⁽⁶⁴⁾. Besides, the theory of vicarious liability of States for the independent behaviour of domestic entities would be subject to the same criticism as the old theory of "group liability", in the sense that it would imply that private behaviour could infringe international obligations addressed to States ⁽⁶⁵⁾.

Consequently, in order to provide for full-scale coverage of restrictive business practices, also including situations in which foreclosure is exclusively produced by private acts, the scope of the WTO provisions does need to be extended. This would be particularly appropriate also because current provisions in the Marrakech Agreements inherently refer to either goods or services, while anti-competitive behaviour and market foreclosure in competition terms relate to business practices and interaction between operators. In other words, they are rules on behaviour of goods or services providers and not on the free movement of goods and services. Whilst this distinction does not in principle affect the possibility of using current provisions to deter anti-competitive behaviour, from a conceptual point of view, the fragmentation of competition rules in different Agreements depending on the kind of final product offered

(63) Such as human or political rights of individual persons internationally recognized and violated by the private entity in a third country.

(64) See F. FRANCIONI, *Imprese Multinazionali, Protezione Diplomatica e Responsabilità Internazionale*, Giuffrè, Milan 1986. The author construes State liability on the assumption that the State should be held automatically responsible for illegal action (i.e., infringing a international obligation) by domestic companies in third countries by reason of its implied duty to check on its domestic companies to the benefit of the international community. The infringement of this implied duty of control would not entail the direct and autonomous liability of the State for having infringed the said duty, but its automatic accountability (vicarious liability) for the acts committed by the private entity.

(65) See the manifest criticism to this theory by G. Sacerdoti, *Stati e Imprese Multinazionali*, in P. PICONE & G. SACERDOTI, *Diritto internazionale dell'economia*, Franco Angeli ed., Milan 1994, p. 710.

on the market has no rational basis and is apt to jeopardise the consistent application of the various proposed substantive rules on the matter.

SECTION III

DE IURE CONDENDO: WHETHER TO INSERT AN EXPLICIT DUTY UPON MEMBERS TO FAVOUR COMPETITION DOMESTICALLY OR TO ADOPT A FULLY-FLEDGED COMPETITION CODE

8. *The Alternatives.*

At the Singapore Ministerial Conference held in December 1996, the WTO Members adopted a declaration establishing a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that might merit further consideration in the WTO framework ⁽⁶⁶⁾. The possible extension of the WTO rules to cover private business restrictions will thus be evaluated in that context.

Aside from the opposition of certain States to any form of multilateral agreement on this matter, it appears that two positions are emerging among WTO Members on the scope of the studies of this working group, which somehow imply profound differences in policy regarding this issue. On the one hand, it appears that some countries support a limited scope for the inquiry, so that this would deal only with the impact of private anti-competitive conduct on trade. On the other hand, some others would prefer to consider the

(66) However, the establishment of this group does not imply any concrete intention to enlarge the scope of the WTO rules to include private business restrictions: "The General Council will keep the work of each body under review, and will determine after two years how the work of each body should proceed. It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations (par. 20)", Singapore Ministerial Declaration, *WTO Focus* No. 15 (Jan. 1997).

effects of both anti-competitive practices on trade and of trade measures on competition, jointly ⁽⁶⁷⁾.

Although it is not immediately self-evident, this difference of opinion concerning the scope of the work of the group does not substantially differ from the divergence noticed in doctrine between those who favour the adoption of a comprehensive international code on restrictive practices ⁽⁶⁸⁾ and those who would support the mere insertion of a explicit duty upon Members to favour competition domestically, including a minimum set of principles to be commonly accepted ⁽⁶⁹⁾. Indeed, the adoption of a comprehensive code on restrictive practices, which in the Munich Code proposal would also imply the appointment of a supranational enforcement agency directly enforcing the Code rules, would not only require the full convergence of Members' domestic competition policies but also a wider consideration and rethinking of the fundamental principles regulating international trade.

Actually, the adoption of a international common code would also imply accepting that competition is a trade-value in itself, in the sense that the battle against foreign competitors discrimination and market foreclosure would be complemented (replaced?) by the

(67) M. MATSUSHITA, *Reflections on Competition Policy/Law in the Framework of the WTO*, speech presented at the Twenty-Fourth Annual Conference of the Fordham Corporate Law Institute, New York, 16/17 October 1997.

(68) The most well-known example of this trend is represented by the International Antitrust Code, which was conceived by a group of competition experts between 1991 and 1993 and usually referred to as "the Munich Code", in *World Trade Materials*, Vol. 5 (Sept. 1993), 126.

(69) One example is the European Commission Notice "Towards an International Framework of Competition Rules", COM(96) 284 def., Brussels 18 June 1996. For the putting forward and the analysis of various proposals for international cooperation, see B. HOEKMAN, *Competition Policy and the Global Trading System*, 20 *The World Economy* (1997), 383; C.D. EHLMANN, *The International Dimension of Competition Policy*, 17 *Fordh.Int.L.J.* (1994), 833. See also the Statement on Competition and Trade Policy before the US Senate Committee on the Judiciary held by J.H. Jackson on 18 June 1992, 26 *J.W.T.* n. 6 (1992), 111; L.J. BERGSTROM, *Should the GATT be Modified to Incorporate a Restrictive Business Practices Provision?*, 17 *W.Comp.L.&Econ.* (1993/94), 121; and, for a very exhaustive debate on this issues, see proceedings of the Competition Workshop of the Robert Schuman Center held at the European University Institute (Florence) in June 1997 (not yet published but on file with the Institute).

battle against distortions of competition at a supra-national level as such. Thus, the question would no longer be one of domestic market foreclosure, foreign discrimination and the restrictive effects of domestic practices in other countries, but of restraints of competition in supra-national markets, discrimination against competitors and its effects on global competition, which would involve the reconsideration of the scope and purpose of government measures aimed at defending domestic industries from unfair practices (such as anti-dumping rules or subsidies), which in this context would lose much of their rationale.

A "minimal approach" would by contrast only deal with those anti-competitive private practices which also restrict trade and would simply make Members directly liable for omitting to fulfil a number of basic commitments. Whereas it could be provided that an international code had direct effect, a "minimal approach" would not depart from the current WTO mechanism of disputes settlement and would not automatically imply the convergence of competition policies.

9. *The Insertion of a Specific Duty to Prohibit and Prevent Domestically Restrictive Practices Hindering Market Access.*

9.1. *The proposals on the table and the grounds for regarding market access as a general principle of trade law.*

The European Commission has been the first to advocate a model for multilateral (*rectius*: plurilateral) ⁽⁷⁰⁾. cooperation within the WTO featuring a few specific obligations for Members (contracting parties) and intergovernmental procedures for disputes settlement, which are perfectly in line with the traditional instruments of trade law ⁽⁷¹⁾. In particular, it proposes to impose a duty

(70) This plurilateral agreement within the WTO is now commonly referred to among competition experts as the TRAMS, Agreement on Trade-Related aspects of Anti-trust Measures.

(71) See above for reference. The European Commission's proposal encompasses more issues than those here described: it suggests a "building-blocks" approach also including the improvement and extension of existing bilateral

on contracting parties to insert in their domestic legislation (i) basic rules on competition, (ii) enforcement rules, and (iii) the right for private parties to address the competent domestic authorities and courts in charge of the enforcement of competition regulations on an equitable, transparent and non discriminatory manner ⁽⁷²⁾. In addition, it envisages the intervention of the WTO disputes settlement system in the event that a contracting party infringes its duty to implement a competition regulation domestically or refuses to open consultations requested by another contracting party claiming violation of the plurilateral agreement, again perfectly in line with current WTO rules. However, the European Commission acknowledges that competition matters might require some adjustments in the disputes settlement procedure, and leaves this matter open for further suggestions ⁽⁷³⁾.

E. Fox offers what she calls "an iteration" of the Commission approach, "one that could supply content to the concept of "appropriate competition rules" to implement domestically (indicated by the Experts Report)" and that "is a proposal for linking principles of a constitutional dimension" ⁽⁷⁴⁾. According to this author, principles of constitutional generality could prohibit unjustifiable anti-competitive blockages of market access and transnational cartels, while providing a discipline for unjustified trade-restraining acts of States. Whilst this alternative proposal follows the same lines as that of the European Commission, it not only specifies the common

cooperation agreements and the participation to a first plurilateral agreement only of those countries which already have well-advanced domestic competition systems. These parallel cooperative schemes would also be accompanied by attempts to harmonize domestic legislation. See also the Experts Report "Competition policy in the new trade order: strengthening international cooperation and rules" which was the origin of the Commission Notice and was published in July 1995.

(72) The Report of Experts in turn recommended that "a plurilateral framework ... be developed (i.e., including most elements already incorporated into the (existing) bilateral agreements, to which would be added a set of *minimum appropriate competition rules*, a binding positive comity instrument and an effective dispute settlement mechanism)", p. 26.

(73) The WTO rules would of course not have any direct effect on private parties, but would only apply to States.

(74) E. Fox, *Toward world antitrust and market access*, 91 *Am.J.Int.L.* (1997), 1.

principles which contracting parties would undertake to implement domestically, but also adds a very important element, by proposing that contracting parties give a concrete content to the “constitutional” principle of prohibition of market access restraints in conformity with their respective domestic legal system: “Opponents of a world system argue that nations would find it impossible to agree on a market access principle. This is not a problem under this proposal. Each nation would define for itself what it means by an “unjustifiable” market access restraint. Simply, it must formulate its law in a credible, nondiscriminatory, clear and understandable way” (p. 24) (75). Indeed, this suggestion affirms the general relevance of the principle of market access, while also constituting an approach that is quite close to the European Community rule of “mutual recognition” of domestic legislation.

Proposals of the kind described above assume that private blockages of market access and transnational hard-core cartels are contemporaneously anti-competitive *and* trade restrictive (76). Indeed, these can be collected under the same label because of the effects which they equally produce on trade: foreclosure of market access. Consequently, it could be maintained that, together with the common general principles of international trade law of *the most-favoured nation* and of *national treatment*, also that of *market access* could be conventionally agreed upon. Leaving aside the question whether these principles in fact have the status of constitutional values of trade law (77), it is undeniable that all the

(75) After these first proposals others have been pointed out. Among those, see KHEMANI & SHONE, *International Competition Conflict Resolution: a Road Map for WTO*, contribution to the competition workshop of the Robert Schuman Center held at the European University Institute (Florence) in June 1997, according to which the duty of contracting parties to enact domestic legislation containing basic common principles would include: (i) non discrimination of foreign companies; (ii) possibility of judicial claims; (iii) *locus standi* also to foreign companies; (iv) independent authorities; (v) consideration of possible effects in foreign markets; (vi) international cooperation for procedural matters.

(76) It is necessary at this point of the legal reasoning to reflect again on the wordings of Article IX of GATS: “Members recognize that *certain* business practices ... may *restrain competition and thereby restrict trade*”

(77) For a global description of this issue, which is outside the scope of this

Marrakech Agreements pivot on these two principles of non-discrimination (the principles of the most-favoured nation and of national treatment), which are complemented by the duty of Members not to impose new duties or other quantitative restrictions (Articles II and XI of the GATT) and the parallel obligation to guarantee market access (Article XVI of the GATS) to foreign products or services. However, in this context the principle of market access as reflected in the GATS and in other Agreements such as that on Agriculture (Article 4), appears to parallel the prohibition of additional duties or other quantitative restraints provided for in the GATT, i.e. to be a sort of *stand-still* clause.

Thus, it could be summarized that in the current Marrakech Agreements three general obligations coexist in this respect: that of not discriminating between foreigners, that of not imposing quantitative restraints outside those mutually agreed upon, and that of not treating foreigners *de facto* in a less favourable manner than nationals. The market access principle could complement these basic principles, imposing the obligation on Members not to create artificial barriers to entry *de facto* by means of either private or public anti-competitive restraints.

Yet, this would not dramatically modify the spirit of the Marrakech Agreements and the general principles of trade law therein embodied; on the contrary — as has been described in Section II — it is already emerging from the interpretation of rules and the frequent affirmation that one of the primary objectives of international trade rules is to create conditions of equal opportunities of competition; this objective only needs to be clearly recognised as applying to all areas covered by the Marrakech Agreements as an autonomous and general principle. As already stated, this would amount to the recognition that a number of measures may be foreclosing not because they directly or indirectly discriminate

paper, see E.U. PETERSMANN, *The GATT/WTO Dispute Settlement System*, Kluwer, London-The Hague-Boston, 1997, in particular p. 32. See also E.A. VERMULST, *A European Practitioner's View of the GATT System: Should Competition Law Violations Distorting International Trade Be Subject to GATT Panels?*, 27 J.W.T. n. 2, 1993, 55, supporting the constitutional value of these principles (in particular, p. 80).

against foreign goods or services (on which assumption is based the current WTO system) but because they artificially hinder market access as such.

Moreover, it should be noted that this tendency of non-discrimination and competition rules to arrive to the same goal of free trade is not unknown for instance to Community law: in various instances, domestic legislation has been challenged both under Article 30 or 52 of the EC Treaty (on free movement of goods and services), on the one hand, and under the combined reading of Articles 5 and 85 or 86 of the EC Treaty (on competition and the impairment of the *effet utile* of Community law), on the other, since anti-competitive restraints have been claimed also to hinder the accomplishment of the Internal Market. Actually, if a criticism can be made of the European Commission it is that of having often used competition tools or rules to achieve market integration without expressly admitting of using competition rules for that purpose (78).

9.2. *States' liability for infringing the obligation to prohibit and prevent restrictive behaviours.*

As we have seen, the market access principle should impose on Members (or contracting parties if a plurilateral agreement is preferred) the obligation not to create *de facto* artificial barriers to entry by means of either private or public anti-competitive restraints, or — to state it differently — to ensure that no restrictive practices having adverse effects on trade are undertaken within their territories. However, different formulations of such an obligation can lead to different results. In particular, an obligation to favour competition domestically could be inserted, or more specifically to implement antitrust legislation domestically. These options, which answer the claim that the first goal to achieve should be to have anti-trust legislation in all Members to level the playing field, would in fact

(78) P. NICOLAIDES, *For a World Competition Authority - The Role of Competition Policy in Economic Integration and the Role of Regional Blocs in Internationalizing Competition Policy*, J.W.T. n. 4, 1996, 131; E. FOX & J.A. ORDOVER, *The Harmonization of Competition and Trade Law*, 19 W. Comp. 1995, 5.

serve the purpose of initiating the process of harmonising domestic legislation, as is happening for intellectual property matters in TRIPS. These would however depart from the approach of limiting intervention to recognition of the market access principle referred to above.

A formulation closer to that of those articles affirming the national treatment principle in other Marrakech Agreements (and borrowing the words of Article IX of the GATS on Business Practices) would instead appear to be more appropriate. Accordingly, contracting parties would recognise that internal laws, regulations and requirements, as well as certain business practices (such as for instance private blockages of market access and transnational cartels, as suggested by E. Fox) may, by themselves or because of the market context in which they are implemented, artificially foreclose access to the relevant market, thereby restricting trade, and would consequently undertake to prohibit and prevent restrictive practices of that kind in their territories. This basic obligation could then be reinforced by a duty of transparency, which is common to most of the Marrakech Agreements, to ensure that (in the light of the "mutual recognition" standard which has been supported above) contracting parties' policies are always accessible and understandable.

In this way, contracting parties would be subject to a clear international obligation to prohibit and prevent restrictive business practices which hinder market access, and States would thus be liable for omitting to fulfill this commitment⁽⁷⁹⁾. This obligation would be objective for result, as GATT dispute settlement practice recognises for the generality of GATT obligations, unless it were formulated so as to require a due diligence standard⁽⁸⁰⁾. Moreover,

(79) International Law Commission, Draft Report on the work of its forty-eight session on State Responsibility, A/CN.4/L. 528/Add. 2, 16 July 1996.

(80) The due diligence standard for States' liability in general international law is seldom applied. For a comprehensive study of its application see R. PISILLO MAZZESCHI, *"Due Diligence" e responsabilità internazionale degli Stati*, Giuffrè, Milan 1989. In the Marrakech Agreements only a few obligations would entail such standard: see *Canada - Import, distribution and sale of alcoholic drinks by Canadian provincial marketing agencies*, Panel Report adopted on 22 March 1988,

and again pursuant to GATT dispute settlement practice, State liability for omission would not depend on proof of actual damage: according to the *Oilseeds* panel, "the exposure of a particular imported product to a risk of discrimination constitutes, by itself, a form of discrimination" ⁽⁸¹⁾.

However, this approach would limit State responsibility for having omitted to prohibit or prevent restrictive practices. It would not imply automatic State liability for the action of private entities, in conformity with what has been suggested in Section II. As said in that context, the majority of legal doctrine would maintain that any proved omission by a State to prevent or prohibit the action of the private entities responsible for foreclosing market access cannot entail the automatic (vicarious) liability of the State for that private action, since the private action could not amount to infringement of an international obligation, in view of the fact that individual persons cannot infringe international obligations. The only relevant international obligation entailing State liability would thus be the direct liability of the State for having omitted to prevent a specific private action.

9.3. *How the trade solution and the application of domestic anti-trust legislation complement each other.*

Consequently, under this approach private entities hindering market access could be prevented from doing so only by national antitrust law. This is the reason why it has been suggested throughout this paper that the improvement of bilateral agreements relat-

BISD 35S/37, concerning Article XXIV:12 of GATT (in particular point 3.54 where the formulation of this Article is reaffirmed to be an exception to a general principle). Article XXXIV:12 GATT states: "Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories". Note that the panel clearly stated that in any event it was up to the contracting parties, and not to the defendant State, to decide whether all reasonable measures had been taken.

(81) *European Economic Community, Payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins*, Panel Report adopted on 25 January 1990, BISD 37S/86125.

ing to the issues of conflict of domestic laws, extraterritoriality and cooperation between anti-trust agencies is a tool to be seen as complementary, and not as an alternative to that of extending multilateral cooperation within trade organizations ⁽⁸²⁾. One advantage of this two-fold action would be to define the difference in scope between trade issues and competition issues even in grey areas ⁽⁸³⁾, since it would be commonly understood that certain practices can contemporaneously restrict competition and trade while entailing different kinds of liability for States and private entities. Another advantage would be that of finally putting an end to the "loopholes" in the global system, thus preventing the circumvention either of trade law principles or basic domestic anti-trust rules, especially in cases of combined public and private action ⁽⁸⁴⁾. Finally, this would definitively make it impossible to justify unilateral retaliatory action in the event of violation of domestic anti-trust laws by foreign companies.

10. *Procedure for the Settlement of Disputes.*

10.1. *An intergovernmental solution.*

The inclusion of the market access obligation among the WTO principles, conjecturally by adopting a new multilateral or plurilateral agreement, would have, as an expected consequence, the application of the WTO disputes settlement mechanism ⁽⁸⁵⁾. In any event, this seems the most natural consequence of the approach which has been followed in this paper, which has never departed from the current WTO rules and procedures but has attempted to

(82) In this regard, see OECD, *Council revised recommendation concerning cooperation between member countries on anti-competitive practices affecting international trade*, adopted by the Council at its session of 27/28 July 1995. The path of a Code of Conduct could also be envisaged: see the example of OECD, *Guidelines for Multinational Enterprises*, 1994 (in particular, Article 4 on competition).

(83) Such as in the recent cases *Boeing/McDonnell Douglas* and *Kodak/Fuji*.

(84) Often, for instance, the use of the Act of State doctrine has shielded private parties from liability for infringement of competition statutes.

(85) See Article 1 DSU.

propose any extension of the scope of multilateral cooperation in the area of business restrictions within the existing framework and commonly recognized principles of general trade law. Other solutions, such as that of an independent authority judging these matters exclusively ⁽⁸⁶⁾, would be anachronistic, as well as disrupting the unity of the dispute settlement mechanism to the detriment of the building-up of a consistent and rule-oriented system.

However, the fact should not be underestimated that matters relating to competition are highly fact-intensive and that market analysis has a fundamental role in the assessment of restrictive practices. Consequently, it should be considered whether in disputes arising out of alleged infringement of the market access obligation the WTO procedure should be given additional powers.

In this regard, it seems that the Agreement on Implementation of Article VI of the GATT 1994, concerning anti-dumping matters, could be of some help. This Agreement refers to the revision of domestic decisions taken in conformity with domestic anti-dumping rules which are alleged to infringe Article VI of the GATT, but it also contains a number of substantive rules aimed at the harmonisation of domestic rules on anti-dumping. The complexity and broadness of this Agreement make it inappropriate merely to transpose its content to address market access disputes. However, one of the elements which is commonly recognised as essential by all scholars analysing the possible regulation of this matter, is that procedures to prevent restrictive practices should be subject to a series of procedural guarantees and rules of transparency. Especially in a "mutual recognition" approach, these would indeed provide the best guarantee of a correct and non-discriminatory application of domestic rules or principles. The Agreement on Implementation of Article VI of GATT contains a series of such procedural rules which are compulsory for Members to follow when implementing their own anti-dumping regulations. In particular, all interested parties must be given notice of the information which the authorities require and ample opportunity to present all the evidence that they consider relevant, as well as to have full opportunity for the defence

(86) See discussion in next Section.

of their interests ⁽⁸⁷⁾. Equally, the relevant authority has a duty to publish notices of the opening and closing of investigations containing adequate information on the case, and applications for judicial review of any decision must be granted. Tribunals or other agencies in charge of the said review must be independent of the authorities responsible for the determination or review in question. Finally, a Committee on Anti-Dumping practices is established, to which Members are to report on any decision taken, and to which they are to submit a six-monthly report on actions taken.

In addition, should a less "minimalist" approach than that illustrated, prevail, the common basic definitions of substantive concepts could parallel those of "dumping" (Article 2), "injury" (Article 3) and "domestic industry" (Article 4) contained in this Agreement.

10.2. *The extension of Article 17.6 of the Agreement on Implementation of Article VI of the GATT 1994 to competition disputes?*

However, the aspect of major interest in this Agreement lies in its Article 17.6, since this indicates the standard of review that a Panel must follow to assess the conformity of the decision of a domestic agency with the Agreement. Indeed, in the context of market access disputes it seems that the most controversial situations will arise when one Member claims that another did not prevent an anti-competitive practice which foreclosed the market and the defendant Member submits a decision in which it decided not to proceed against the relevant practice or alternatively maintains that in its judgment the practice did not foreclose the market in the circumstances (i.e., in view of the characteristics of the relevant market or otherwise) ⁽⁸⁸⁾.

(87) Article 6.5 contains an elaborated discipline on treatment of confidential information.

(88) Since the disputes settlement mechanism follows a consultation phase, it could be expected that objections such as that the relevant authority was not aware of the practice would be addressed during that phase, in which the "defendant" could also undertake to consider the claim of the other Member and to make

Yet this Article raises various problems that are not easy to solve. The first paragraph of Article 17 states that the DSU applies to this Agreement, except as otherwise provided. It is evident that Article 17.6 differs somewhat from the standard of review embodied in the DSU. Indeed, letter 17.6 i) states that the Dispute Settlement Body ("DSB"), in its assessment of the facts of the matter, must determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, then, even though the Panel might have reached a different conclusion, the evaluation cannot be overturned.

It appears from the wording of this provision that in the cases regulated by Article 17.6 the DSB can only operate a review of legitimacy, in the sense that it cannot consider the merits of the case but must simply evaluate (i) that the decision was not based on evident misunderstanding of the facts (*proper establishment of the facts*), (ii) that their evaluation was reasonable (*unbiased*) and (iii) not apparently arbitrary (*objective*). This would distinguish the Article 17.6 standard of review from that of Article 11 DSU, of general application, according to which "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".

In conformity with the suggestion that the definition of unjustifiable restraint should be left to domestic legislation, provided that this is credible, nondiscriminatory, clear and understandable, the limited powers of the DSB in the event of market access claims involving the assessment of a Member's appraisal of a restrictive practice, which would derive from the application of Article 17.6, should be welcome ⁽⁸⁹⁾. However, some uncertainty in this regard is

the relevant investigation. Moreover, complementary bilateral agreements should favour exchange of information on possible infringements.

(89) According to the Decision on Review of Article 17.6 of the Agreement

produced by the statement of the Panel Report in *United States-Restrictions on Imports of Cotton and Man-made Fibre Underwear* ⁽⁹⁰⁾, according to which, although a policy of total deference to the findings of the national authorities would not ensure an "objective assessment" as foreseen by Article 11 of the DSU, the proceedings before the DSB should not represent a substitute for the proceedings conducted by national investigating authorities. In particular, it is stated that "an objective assessment would entail an examination of whether the CITA had examined all relevant facts before it, whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligation of the United States" (p. 74).

This statement, made pursuant to Article 11 DSU, makes the distinction between this general standard of review and that under Article 17.6 less certain, also in view of the fact that in making its statement the Panel Report expressly refers to previous panels on anti-dumping ⁽⁹¹⁾. However, it should still be possible to conclude that the standard of Article 17.6 is meant to be more restrictive than Article 11 DSU. This should also be supported by the content of letter ii) of Article 17.6, whose significance is perhaps even more obscure than that of letter i), but which at first sight appears to indicate a general preference for the assessment operated by the national authority in any case of ambiguity or uncertainty. This states: "where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations".

on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 annexed to the Marrakech Agreements, the standard of review in paragraph 6 of Article 17 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application.

(90) Panel Report adopted on 8 November 1996.

(91) The formulation of Article 17.6 was originated exactly by the unsatisfactory application, according to US opinion, of Article 11 to anti-dumping disputes, where the Panel was deemed not to have the power to *de novo* examine the merits of the case. See D. PALMETER, *A Commentary on the WTO Anti-Dumping Code*, J.W.T. August, n. 4, 1996, p. 43.

This ambiguous formulation, which is also inconsistent with customary international law on treaties interpretation as re-stated by Article 31 of the Vienna Convention (which does not seem to contemplate alternative and equally correct interpretations of the same treaty rule), is legally meaningless and appears to be an attempt to reduce any power of review of the DSB, whether on the facts or on the legal standard applied. However, while the standard embodied in Article 17.6(i) should be supported, in order not to interfere with the assessment of *facts* based on national law, the *legal appraisal* under letter ii) by the DSB should relate to the conformity of the decision not with national law, but with the relevant multilateral agreement. The transposition of Article 17.6 to market access disputes is thus suggested; but subject to the qualification that only its letter i) should apply.

11. *The Alternative Solution: Rethinking the Basic Principles of Competition and Unfair Practices in International Trade.*

11.1. *The Munich Proposal for a International Code of 1993.*

An alternative solution for extending multilateral cooperation on business restrictions other than those which have been illustrated above, would be the adoption of a fully-fledged international code, possibly including an independent agency to settle relevant disputes. As briefly mentioned, when this option is considered, all scholars refer back to the so-called Munich Code, elaborated by a group of eminent competition and trade experts between 1991 and 1993 ⁽⁹²⁾. The fact that this project is much more ambitious than the alternative schemes which have been described above, is clear not only from the broadness of its scope, which disciplines basically all potentially restrictive practices (horizontal and vertical restraints,

(92) See above for reference. See also the UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, *I.L.M.* 1980, 813. This *soft law* instrument establishes a set of competition principles to serve the accomplishment of the New International Economic Order, and consequently makes continuous reference to the possible damage to developing countries and provides for their special treatment.

concentrations, abuse of dominant position and the regime for public undertakings and State authorizations), but also from its provision for an international antitrust agency, and for the recognition in the introductory remarks to it that the separation of anti-trust and trade rules is in certain regards untenable ⁽⁹³⁾. Although the Code is expressly declared to address only antitrust matters, it states that this is only a choice of convenience, since a broader goal would have required additional study and efforts. By contrast, "an International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement should eventually deal with the inconsistencies and 'protectionist biases' of GATT's current 'unfair trade rules' which allow discriminatory antidumping duties on dumped imports and countervailing duties on subsidized imports even if the competing domestic producers engage in the same price discrimination practices and benefit from similar subsidies and 'protection rents' (point III of Introduction)" ⁽⁹⁴⁾.

Moreover, the Munich Code offers a criterion for jurisdiction, in the sense that it explicitly states that it would only cover cross-border situations, while cases with merely domestic relevance should be covered by the relevant domestic legislation. This additional qualification of the content of the Munich Code envisages a very interesting aspect of the matter: the adoption of a code at the supra-national level would require a rethinking not only of the whole issue of the principles regulating international trade, but also of the scope of domestic, supra-regional (such as the EC) and supra-national regulation, i.e., of a sort of subsidiarity principle also at the international level ⁽⁹⁵⁾.

(93) W. FIKENTSCHER and U. IMMENGA, *Draft International Antitrust Code*, Nomos Verlags, Baden-Baden 1995. See for instance p. 55: "Both disciplines — the antitrust and trade law of low pricing — address the same phenomenon, yet they pursue different paths. An international regime in the interests of the citizens of the world would view the problem as a forum for the working out of a common rule, deflecting the protectionism that may result from a solely trade perspective".

(94) It must be noted that a number of the drafters supported a more limited approach, for a Code only embodying fifteen common principles.

(95) See J.H. JACKSON, "The World Trade Organization and the Sovereignty Question", *L.I.E.I.* (1996/1), 179, in particular p. 186. Taken to extremes, this issue would also raise questions of the direct applicability of trade rules and the role of

11.2. *Trade, unfair practices and competition: a unique consistent trade-competition system?*

The criticism of the Munich Code which commonly arises, is that the present time is quite unripe for such an ambitious project. Emerging States' positions on this matter and the undisputed fact that competition policies (when they exist at domestic level) may greatly differ from country to country, — thus making it highly unrealistic to build up a fully-fledged commonly agreed anti-trust code under current circumstances —, support and confirm this criticism. However, it is undeniable that the proposal of the Munich Code, which has also been accused of having said much more than was originally intended by its authors, is challenging and fascinating for the number of issues it raises. Although it is impossible in the context of this paper to delve deeply into such issues, since they involve too many and too complex legal and economic considerations, one is compelled at least to summarise the evident implications of this alternative solution for the enlargement of multilateral cooperation to deal with restrictive business practices.

As briefly introduced in the above pages, the most relevant issue raised by the proposal for a fully-fledged international code is whether competition issues should be recognised as being a trade-value *per se*. Such recognition would automatically imply that existing rules on “unfair practices” (such as anti-dumping and subsidies) and in general on contingency (also including safeguards) should be reconsidered because they run in parallel with those on competition.

This issue is of course not new. There is already widespread debate on the role, for instance, of anti-dumping rules in international trade and their inherent tendency to conflict with other

national courts, which are outside the scope of this paper. However, for some reflections on the possible lines of thoughts in this regard, see P. MINGOZZI, *The Marrakech DSU and its implications on the international and European level*, in J. BOURGEOIS, F. BERROD & E. GIPPINI FOURNIER (eds.), *The Uruguay Round Results*, European Interuniversity Press, Brussels 1995, p. 115 (in particular p. 124 on direct applicability of the Marrakech law); and M. HILF, *The role of national courts in international trade relations*, 18 *Mich.L.Rev.* (1997), 321.

aspects of international trade policies ⁽⁹⁶⁾. In addition, the adoption of an international set of anti-trust principles may be argued to be apt to deprive anti-dumping rules of their rationale, since the supposed evils against which anti-dumping regulations are meant to stand could be better defeated by competition instruments. In particular, the most often advanced argument in this regard is that frequently the "dumped" price is not at all unfair, but the home price (to which the export price is compared to determine its unfairness) is artificially high because in that market the relevant undertaking is in a dominant position. Consequently, the "evil" resides in the practice in the home country and not in that in the exporting country; however, anti-dumping measures would not prevent the actual distortion, but, paradoxically, would artificially raise the export prices also ⁽⁹⁷⁾. Moreover, even when the export price is artificially low, this may be caused by the capacity of the importer to cross-subsidize sales of that product in the export market because again it has a dominant position in other markets where it can keep prices artificially high. Besides, anti-dumping disputes often give rise to measures which are in themselves restrictive, such as export cartels or price-fixing arrangements, as well as voluntary export restraints.

Equally, a series of considerations are required concerning sa-

(96) J.H. JACKSON, *Dumping in International Trade: Its Meaning and Context*, in J.H. JACKSON & E.A. VERMUELT (eds.), *Antidumping Law and Practice*, Harvester 1989, 1; R. DENTON, *(Why) should nations utilize antidumping measures?*, 11 *Mich.J.Int.L.* (1989), 224; R. BHALLA, *Rethinking Antidumping Law*, 29 *Geo. Wash. J. Int'l L. & Econ.* (1995), 1.

(97) M. MATSUSHITA, *Coordinating International Trade with Competition Policies*, in E.U. PETERSMANN & M. HILF (eds.), *The new GATT Round of Multilateral Trade Negotiations*, Kluwer, London-The Hague-Boston 1988, 395; P. MESSERLIN, *Should Antidumping Rules be Replaced by National or International Competition Rules?*, 18 *W.Comp.* (1995), 37; D.J. GIFFORD, *Antitrust and trade issues: similarities, differences, and relationships*, 44 *DePaul L. Rev.* (1995), 1049, in fact limiting his analysis to criticism to application of anti-dumping legislation by the US Government (see in particular p. 1092); M. TREBILCOCK, *Competition Policy and Trade Policy - Mediating the Interface*, *J.W.T.* n. 4, 1996, 71; C. MORGAN, *Competition Policy and Anti-dumping - It is time for a reality check?*, *J.W.T.* n. 5, 1996, 61; B. HOEKMAN & P. MAVROIDIS, *Dumping, Antidumping and Antitrust*, *J.W.T.* n. 1, 1996, 27.

feguard measures, indeed including voluntary export restraints⁽⁹⁸⁾, and competition. In particular, it has been claimed that the insertion of Article 11 of the Safeguards Agreement, banning, *inter alia*, the use of voluntary export restraints, has privileged other less appropriate unilateral measures to implement protectionist policies (including, indeed, anti-dumping measures)⁽⁹⁹⁾. This Article is the consequence of the general understanding that competition policies, by permitting and in certain cases supporting export cartels, would in turn damage trade policy. However, the insertion of just one rule concerning this kind of practice, without a global consideration of the whole set of rules on protective measures, on the one side, and competition, on the other side, may well prove to be unsatisfactory. Thus, also from this respect, a global consideration of competition issues and of their running in parallel with contingency measures is needed, this time looking at the question from the opposite perspective: under certain conditions, the complete removal of trade impediments would inevitably require a prior multilateral agreement on competition rules and other domestic policies of assistance to industry which may indeed distort trade⁽¹⁰⁰⁾.

Although it is commonly accepted that trade and competition policies serve the same ultimate goal of achieving an efficient allocation of resources, it is thus undisputed that there are conflicts in both the short-run objectives and the tools employed to accomplish either of these policies. Legal and economic literature are a sort of to and from of accusations alternately against trade and compe-

(98) M. MATSUSHITA, *Coordinating International Trade with Competition Policies*, and H. SCHLOEGL, *Trade and Competition Policy Aspects of VERs: a Comment*, both in E.U. PETERSMANN & M. HILF (eds.), *The new GATT Round of Multilateral Trade Negotiations*, Kluwer 1988, 395 and 433, respectively; R. GREY, *The Conflict Between Trade Policy and Competition Policy: a Comment*, in E.U. PETERSMANN & M. HILF (eds.), *The new GATT Round of Multilateral Trade Negotiations*, Kluwer 1988, 447, on contingency protections in general; J. GAISFORD & D. McLACHLAN, *Domestic Subsidies and Countervail: The Treacherous Ground of the Level Playing Field*, 24 J.W.T. 1990, 55.

(99) M. BRONCKERS, *Voluntary Export Restraints and the GATT 1994 Agreement on Safeguards*, in J. BOURGEOIS, F. BERROD & E. GIPPINI FOURNIER (eds.), *The Uruguay Round Results*, 1995, p. 273.

(100) OECD, *Trade and Competition Policies: comparing objectives and methods*, OECD Publications 1994.

tition policies as obstructing each other; among the proposed solutions, there is the hope for a more coherent global foreign policy within each State, the convergence of competition policies, and the reduction of contingency measures ⁽¹⁰¹⁾. A more ambitious project, following from the proposal to adopt an international code on competition, could on the contrary be to rethink a consistent trade-competition set of rules which an understanding of the Marrakech Agreements as a single undertaking and a single body of rules to be interpreted consistently could help to support. This would in particular imply not radically the "dumping of antidumping (and other contingency) legislation" ⁽¹⁰²⁾, but the elaboration of standards of consistency on the lines proposed, according to which the lack of contestability of an exporter's home market would be a necessary pre-condition for an anti-dumping investigation, so that the requirement of "unfair trade" which justifies the anti-dumping remedy would be exclusively satisfied according to a competition criterion ⁽¹⁰³⁾.

(101) See conclusions OECD, Trade and Competition Policies: comparing objectives and methods, 1994.

(102) The expression is borrowed from J. MIRANDA, *Should Antidumping Laws be Dumped?*, 28 *Law&Pol.Int.Bus.* (1996), 255.

(103) B. HOEKMAN & P. MAVROIDIS, *Dumping, Antidumping and Antitrust*, *J.W.T.* n. 1, 1996, 27.

ANDREU OLESTI RAYO

COMMENTS

SUMMARY: 1. Purposes of Competition Policy. — 2. Competition Policy in an incomplete Market. — 3. Concluding remarks.

The object of this paper is to make some reflections on the studies that Joanna Gomula and Maria Chiara Malaguti have written. First, I would sincerely like to congratulate both authors on their serious and excellent work, for it is the interesting and thought-provoking topics and ideas that they introduce which inspire these comments concerning certain aspects related to States' duties and private barriers to international trade.

My first observation relates to the notion that competition policy implies a specific approach to the idea of an economic philosophy and emphasizes values, either social or economic, which are inherent in the societies involved in a relevant market. In light of this, the question may be raised whether in international society there are values to be considered when designing a strategy for global competition law.

The second issue I would like to address is whether it is practical to speak of a competition policy in the absence of a real market, in the sense that the market is not complete. Here, focusing on the WTO, the proposed liberalization concerns only certain productive factors (relating to goods and services), and therefore there is a potentially distorting fragmentation of the market.

1. *Purposes of Competition Policy.*

If a competition policy, or at least the creation of rules governing competition among economic agents, is possible, one might ask which values are to guide behavior within the framework of this

policy. Most frequently, competition policy aims at a more efficient distribution of resources and at granting benefits to consumers; however, in some cases, other economic aims, perhaps social or political values, might also influence the rules established in a competition policy. The European Community policy serves as a good example. The European Competition Policy is not considered as a goal in itself, but is achieved according to the European Community objectives. On this point, the Court of Justice of the European Communities (ECJ) has been quite clear. For instance, in the *Continental Can* ⁽¹⁾ case, the ECJ held that Treaty Article 85 and 86 must be interpreted in light of the objectives of the European Community Treaty. In this sense, the achievement of the internal market as a main goal of the European integration process serves as a reference by which application of the competition policy within the European Community is measured. The European Competition Policy aims at preventing economic agents from distorting competition by creating new fragmentation within the internal market. However, the European integration process is dynamic. This means that the content of European competition policy is also dynamic: it depends ultimately on the integration objectives which are pursued by the European institutions.

By the same score, due to the political and social values underlying European competition policy, certain practices which might otherwise be considered anti-competitive are allowed ⁽²⁾. The protection of small firms in order to enter markets (i.e., permitting certain forms of cooperation among small firms) or the Commission's regulation of State aid to industry and to depressed regions are good examples of these different goals of the European Competition Policy ⁽³⁾.

(1) Case 6/72 *Europemballage Corporation and Continental Can v. the Commission of the European Communities*, [1973] ECR p. 215 at point 25.

(2) Some authors have considered that this position represents an abandonment of the aim at economic efficiency that all competition policies should pursue. See, e.g., V. KORAH, "EEC Competition Policy - Legal Form or Economic Efficiency", 36 *Current Legal Problems* p. 85 (1986).

(3) See e.g., B. E. HAWK, *United States, Common Market and International Antitrust: a comparative guide*, vol. II. (Clifton: Prentice Hall Law & Business) 1987, p. 8-10.

If these same parameters were to operate within a different system of values, both the contents and the results of competition policy would vary. Situations of similar circumstances would be resolved differently. The establishment of a competition policy or of competition guidelines within the framework of the WTO, therefore, requires several considerations.

First, exporting established competition models, such as those of the United States or the European Union, to the entire international community clearly would not be the answer. Competition law in the European Union reflects social and economic interests quite different from those protected by the United States authorities ⁽⁴⁾. Moreover, some practices, although considered restrictive or anti-competitive, might be permitted depending on the interests they seek to protect. Therefore, in order to consider the possibility of a set of global competition rules governing economic activity, the values and interests which underlie economic activity in the international community must be taken into account.

Indeed, the systems which develop are diverse not only because of different values reflected in the attitude towards competition or competition law, but also because of varying status in the international community. The United States and Japan are States; the European Community is an international organization which has achieved an internal market defined as an area without internal frontiers and in which the free movement of goods, persons, services and capital is guaranteed in accordance with the provisions of the European Community Treaty ⁽⁵⁾. The WTO does not strive to create an internal market in principle, but only to establish in a broad sense the free movement of goods and services. Therefore, the degree of economic integration pursued by the WTO differs from that pursued by the European Community or by other States.

Thus, such interests or values must be sought in the interna-

(4) For a comparative table describing competition policy in the United States, Japan and the European Community, and how these issues are dealt with in the respective legal orders, see A. MATTOO and A. SUBRAMANIAN, "Multilateral Rules on Competition Policy - A possible way forward," 31 *JWT* pps. 95, 98-102 (1997).

(5) Treaty Article 14 ECT (ex Article 7a).

tional community. One place where those values and interests may be found is in the universal organizations, among them the WTO Charter, an international constitutional agreement signed by more than one hundred contracting parties. In the preamble of the Agreement Establishing the World Trade Organization, reference is made to the notion of sustainable development ⁽⁶⁾ and to the commitment to make positive efforts in support of the least developed countries ⁽⁷⁾. In addition to the WTO Agreement itself, declarations were made by some of the contracting parties during the Conference where the Marrakesh Agreements were adopted: for instance, one decision on measures adopted in favor of the least-developed countries recognized that in the area of market access, preferential access remains an essential means for improving the least-developed countries' trading opportunities ⁽⁸⁾.

The idea of sustainable development was first outlined at the United Nations Conference on Environment and Development, held

(6) The preamble of the WTO Agreement state that the aims of the Organization are: that the relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objectives of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development. (See MTN/FA II, at p.1).

(7) In the same preamble, there is a special mention of developing countries in the sense that: "there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development." (Id., at p. 1).

(8) In this sense, certain commitments are made by contracting parties, such as: to ensure through regular reviews expeditious implementation of all special and differential measures taken in favor of the least-developed countries including those taken within the context of the Uruguay Round; or the flexible application and in a supportive manner for the least-developed countries of the rules set out in the various agreements and instruments and the transitional provisions in the Uruguay Round; or to keep under review the specific needs of the least-developed countries and to continue to seek the adoption of positive measures which facilitate the expansion of trading opportunities in favor of these countries. (See MTN/FA III-1, p. 1-2).

in Rio de Janeiro on June 3-14, 1992 ⁽⁹⁾. Among the several resolutions adopted by the Conference, the Rio Declaration on environment and development is of particular significance ⁽¹⁰⁾. Its Principle 5 states:

“All States and people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.”

And Principle 8 contemplates:

“[T]o achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.”

During the Rio Conference, Agenda 21 was also adopted ⁽¹¹⁾. Its main aim is to address today's pressing problems and to prepare the world for the challenges of the next century. It is a global consensus and a political commitment on development and environmental cooperation ⁽¹²⁾. This document established a program that is to be carried out with respect to the principles set out in the Rio Declaration and according to the situation, capacity and priorities of each country and region. In particular, in the implementation of Agenda 21, special consideration is made for the special circumstances facing transition economies ⁽¹³⁾.

(9) A/CONF.151/26/Rev.1 (Vol. I). There is no definition provided for what must be understood by sustainable development, nor whether this concept must be linked necessarily to the goal of respecting and protecting the environment.

(10) A/CONF.151/26/Rev.1 (Vol. I), Annex I.

(11) See Agenda 21, A/CONF.151/26/Rev.1 (Vol. I), Annex II, point 1.3.

(12) *Id.*, point 1.6.

(13) It must also be stressed in the following sense: Chapter IV of the Agenda concerns the changing consumption patterns, and it is divided into two program areas: the first focuses on unsustainable patterns of production and consumption; the second on developing national policies and strategies to encourage changes in unsustainable consumption patterns. The Agenda proposes changes in patterns of demand and redistribution of wealth. Excessive demand and unsustainable lifestyles in the richer regions of the world cause stress on the environment which must be reduced while meeting humanities basic needs. (See *id.* at points 4.5 - 4.7).

Chapter 2 of Agenda 21 deals with domestic policy and international cooperation to accelerate sustainable development in developing countries. Among the program areas contemplated in this chapter, an international trading system which takes into account the needs of developing countries is envisioned as a tool for the promotion of sustainable development.

The 1996 WTO Ministerial Conference in Singapore led to the adoption of a comprehensive and integrated plan of action for least-developed countries ⁽¹⁴⁾. This plan, however, is general and ambiguous and further implementation is required. For instance, the second section concerning market access establishes that both developed and developing country Members may explore on an autonomous basis "the possibilities of granting preferential duty-free access for the exports of least-developed countries. In both cases exceptions could be provided for." Also, "WTO Members should pursue, on an autonomous basis, preferential policies and liberalization undertakings in order to further facilitate access to their markets for least-developed countries' exports" ⁽¹⁵⁾.

In addition to Agenda 21, other international instruments stress similar ideas. One of these is the set of multilateral business practice principles which were approved by the Restrictive Business Practice Conference, held under the auspices of the United Nations Conference on Trade and Development ⁽¹⁶⁾. This instrument was approved by the General Assembly of the United Nations in its Resolution 35/63 of December 5, 1980. The principles adopted by the Conference are to be applied to all transactions in goods and services, and are addressed both to States and enterprises ⁽¹⁷⁾. Enterprises are called upon to refrain from practices which limit access to markets, such as price-fixing agreements, collusive tendering, concerted re-

(14) Singapore Ministerial Declaration, December 13, 1996, in WT/MIN(96)/DEC/W.

(15) *Id.* at point 16.

(16) The Conference was held in Geneva in two periods: from November 19 - December 8, 1979, and from April 8 - 22, 1980. The set of multilateral business practice principles was adopted as an annex to the Conference Resolution of April 22, 1980. Those principles can be consulted in document A/C.2/35/6 Annex.

(17) See A/C.2/35/6, Annex, p. 5.

fusal of supplies to potential importers, or allocation by quota of sales and production. Furthermore, they should refrain from abusing a dominant market position when such abuse might limit access to markets ⁽¹⁸⁾. States, at the national level or through regional groupings, are encouraged to adopt, improve and effectively enforce appropriate legislation, and to implement judicial and administrative procedures for the control of restrictive business practices. In this control, equal and fair treatment of all enterprises is to be ensured ⁽¹⁹⁾.

The provisions included in such international instruments do not have binding effect. They express the political will of States rather than legal obligations. Nevertheless, the Rio Declaration, Agenda 21, and General Assembly Resolution 35/63 were all adopted by general consensus. Therefore, the door is open for further development of those values which could eventually impose legal obligations on the members of the international community.

These are, of course, only a few of the elements which should be taken into account. Economic efficiency is not the only goal to be pursued. Furthermore, not only are WTO Members playing under different conditions, but some very likely are playing on an entirely different field.

(18) Dominant position is to be understood as: "a situation where an enterprise, wether by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods and services." (A/C.2/35/6, Annex p. 5). Examples of abuse of dominant position include, for instance: predatory behavior towards competitors, such as below-cost pricing to eliminate competition; fixing the price at which goods exported can be resold in importing countries; or when certain behavior is adopted — without a view to the achievement of legitimate business purposes such as quality, safety, adequate distribution or service — such as: partial or complete refusals to deal on the enterprise's customary commercial terms; making the supply of particular goods and services dependant upon the acceptance of restrictions on the distribution or manufacture of competing or other goods; imposing restrictions concerning the destination, form or quantity of goods supplied or other goods for resale or export; making the supply of particular goods or services dependant upon the purchase of other goods or services from the suppliers or his designee. (*Ibid.* at p. 7-8).

(19) A/C.2/35/6, p. 9.

2. *Competition Policy in an incomplete Market.*

The WTO seeks to create neither a common market nor a free trade zone or customs union; it seeks to create a zone in which the free movement of goods and services, as well as certain related aspects, may be achieved. With this in mind, the question arises whether competition policy is realistic. The answer probably would be positive or should be affirmative ⁽²⁰⁾ (actually one of those trade related issues could be the one on anti-trust measures) ⁽²¹⁾; although it must be kept in mind that depending on the economic objectives pursued by the International Organization, in this case the WTO, a competition policy, or the scope of that given policy could differ.

For example, are anti-dumping measures to be included in a global competition policy, or is the question one of the need for closer economic integration? Some argue that antidumping measures do not benefit international trade, that in fact firms or countries which dump do so because, thanks to their dominant position, they compensate the losses incurred in a market with the profits gained in another. Maybe the idea that could be underlying is that in order to have a competition policy which could include antidumping measures, a closer economic integration could be needed.

In the European Community experience, the ECJ recognizes the existence of predatory prices only when the firm in question has a dominant market position in a relevant market and abuses this dominant position by adopting a predatory policy ⁽²²⁾. Nevertheless, the European Community is an internal market in which the free movement of the factors of production, and not only of goods and services, along with the freedom of establishment and the freedom

(20) In this sense is quite relevant the ideas of the European Commission concerning the international aspects of competition law, as well as how (and in which forum) those aspects should be dealt. See *Towards an international framework of competition rules*, Communication of the European Commission to the Council, COM (96) 284.

(21) For a development of this idea, expressed in a market access principle for the world, see. E. M. Fox, "Toward World Antitrust and Market Access", 91 *AJIL*, 1, 19-25, (1997).

(22) See Case T-83/91 *Tetra Pack International S.A. v. European Communities Commission*, [1994] ECR-II 755.

to provide services, is guaranteed. And within this internal market, antidumping measures are covered in the European Community competition policy.

The WTO plays a different role and pursues economic aims different from those of the European Community. A more integrated economy, such as the European example, may be a prerequisite for the development of a competition policy. However, economic integration is not the aim of the WTO. And yet, a kind of spill-over process resulting from the development of free movement of goods and services is not to be ruled out. In order for a more efficient process of free movement of goods and services to develop, further integration in some related areas should be achieved. In principle, the WTO system does cover *trade-related* issues, but the achievement of a more integrated economic system requires that Member States agree to transfer some of their sovereign powers to the international organization.

If we talk about free movements of productive factors in order to achieve further economic integration, then probably the main issue is the one concerning free movement of workers. It is quite clear that a sort of free movement of workers in an space (world space) so heterogeneous could be considered as at least unrealistic. The WTO's idea here is to rely on another international organization — the International Labor Organization, or the ILO — when dealing with these such trade-related issues. In fact, at the WTO Ministerial Conference held in Singapore, the ILO was named as the competent body to set and deal with internationally recognized core labor standards. The use of labor standards for protectionist purposes was rejected, with Members agreeing “that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put in question” ⁽²³⁾.

3. *Concluding remarks.*

Although open trade is healthy for the world economy, other considerations must be kept in mind. First of all, in the absence of

(23) Singapore Ministerial Declaration, *supra* note 13 at point 4.

a single market, distortions are almost unavoidable. Steps have been taken in certain sectors (goods and services) within the framework of the WTO, but further steps are difficult because the approach to liberalization is fragmented, due to the fact that all factors of production are related, but at present only some of them are being liberalized.

Second, in order to include antidumping measures in any kind of global competition or antitrust policy, further economic integration is necessary. However, deeper economic integration would somewhat limit Member State sovereignty in so far as the exercise of certain competences are concerned: but, in the present evolutionary stage of the international community, is this possible?

Third, with respect to the European Union experience, it must be remembered that the achievement of the common market through the free movement of all factors of production aggravated rather than alleviated the economic differences between the richest and poorest regions. A regional policy, which was not included in the Treaty of Rome, was subsequently created in order to reduce the development gap between the regions. Therefore, if such a gap arose in the integration process of the fairly homogenous economies of developed countries, imagine the result on a world-wide scale, where economic situations vary widely. Are we aware of the need to adopt a world regional policy?

VI.

NULLIFICATION AND IMPAIRMENT
OF WTO BENEFITS

BRETT G. WILLIAMS

NON-VIOLATION COMPLAINTS IN THE WTO SYSTEM (*)

SUMMARY: 1. Introduction to the problem of defining a non-violation complaint. — 1.1. The Concept of a Non-Violation Complaint under GATT 1947. — 1.2. The Key Variables in Interpreting the Non-Violation Nullification or Impairment Clause. — (a) Benefit. — (b) Subsequent Measures. — (c) Measures and Omissions. — (d) Measures of Government or Actions of Private Parties. — (e) Reasonableness and Legitimacy of Expectations. — (f) Upsetting Competitive Position or Trade Flows. — (g) Measures Conforming to Specific Exceptions. — (h) Measures Conforming to Requirements of One of the Specific Agreements on Multilateral Trade in Goods. — 1.3. The Importance of Determining the Proper Scope of Non-Violation Complaints in the WTO System. — 1.4. Alternative Approaches to the Nullification or Impairment Problem. — 2. Non-violation complaints in the text of the Agreement Establishing the WTO. — 2.1. The Dispute Settlement Understanding. — 2.2. Agreement on Trade-Related Aspects of Intellectual Property. — 2.3. General Agreement on Trade in Services. — 2.4. Multilateral Agreements on Trade in Goods - GATT 1994. — 2.4.1. Non-Violation Complaints Under Article 26(1) of the DSU. — 2.4.2. Situation Complaints under Article 26:2 of the DSU. — 2.4.3. The Understandings Incorporated in GATT 1994. — 2.5. Other Multilateral Agreements on Trade in Goods. — 2.5.1. Agreements which simply incorporate the operation of Article XXIII without adding further provisions. — 2.5.2. Agreements which incorporate the operation of Article XXIII but which also add further dispute settlement provisions. — 2.5.3. Agreements which establish dispute settlement provisions without reference to Article XXIII. — 2.5.4. The one Agreement which establishes dispute settlement provisions and incorporates part only of Article XXIII. — 2.6. How is the Nullification or Impairment Problem Dealt With? — 3. The

(*) The paper was written before the distribution on 31 March 1998 to Members of the panel report in "Japan - Measures Affecting Consumer Photographic Film and Paper" (WT/DS/44). The author has decided to leave review of that decision for future work. The author takes sole responsibility for the ideas presented in this paper.

law relating to the interpretation of treaties and the Agreement Establishing the WTO. — 4. Literal interpretation of the non-violation complaint provisions. — 4.1. Subsidies. — 4.2. Domestic Taxes. — 4.3. Import Barriers. — 4.4. Import Barriers Conforming to Exceptions or Specific Agreements. — 4.5. Domestic Standards. — 4.6. Omissions from Law or Failures to Enforce Law. — 4.7. Nullification or impairment of benefits under TRIPS. — 4.8. Observations on the Literal Interpretation. — 5. Interpretation of the text in the context of all of the provisions of the agreement. — 5.1. The Importance of the Balance of Concessions to Dispute Settlement. — 5.1.1. Provisions Prohibiting Conduct that would Undermine or Circumvent Tariff Concessions of Scheduled Commitments. — 5.1.2. Provisions Permitting Renegotiation of Concessions or Commitments. — 5.2. Consideration of Whether any Restriction of the Application of Article XXIII is Implied by the way that other Provisions of the Agreement Provide for Escape Clauses to Respond to Specific Circumstances. — 5.3. Consideration of Whether Any Restriction of the Application of Article XXIII is Implied by the Way that Other Provisions of the Agreement Provide How Parties can Respond to Restrictions Imposed by Other Parties. — 5.3.1. Response to Restrictions Imposed Under the GATT. — 5.3.2. Response to Restrictions Imposed under the GATS. — 5.4. Whether the above Considerations Indicate Upon Whom Lies the Onus to include References to Specific Matters in Schedules of Concession. — 6. Subsequent agreement between the parties as to interpretation and subsequent practice establishing agreement as to interpretation of the non-violation provisions. — 6.1. *Chile v Australia - Australian Subsidy on Ammonium Sulphate - 1949*. — 6.2. *Norway v Germany - Treatment by Germany of Imports of Sardines - 1952*. — 6.3. Other Decisions - 1948-1982. — 6.4. EEC: production aids granted on canned fruit and dried grapes - 1982. — 6.5. EEC tariff treatment on imports of citrus products from certain countries in the Mediterranean region - 1982. — 6.6. EEC - Payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins - 1989. — 6.7. Follow-Up Report of the Oilseeds Panel - 1992. — 6.8. Other Relevant Disputes. — 6.9. Post-Uruguay Round Practice. — 7. Rules of international law relevant to interpretation of provisions relating to non-violation complaints. — 7.1. The WTO in the context of International Law Relating to State Responsibility. — 7.2. The International Law of Treaties Relating to Good Faith Observance of Obligations. — 7.3. The International Law of Treaties and the Doctrine of *Rebus Sic Stantibus*. — 7.4. The Existence in International Law of a Rule Protecting Legitimate Expectations. — 7.5. Relevant Principles of International Law. — 8. Consideration of preparatory work of the treaties — 8.1. Preparatory Work for Article XXIII of The GATT 1947. — 8.2. Preparatory Work in the Uruguay Round. — 8.2.1. Preparatory Work on the Dispute Settlement Understanding and on the GATT. — 8.2.2. Preparatory Work Relating to the GATS. — 9. In the Light of its Object and Purpose. — 10. Summary.

1. *Introduction to the problem of defining a non-violation complaint.*

The concept of non-violation complaints in the law of the World Trade Organization ('WTO') ⁽¹⁾ is almost unique in international law ⁽²⁾. The idea of attaching dispute settlement procedures and even the possibility of countermeasures to actions that are not in violation of any legal obligation does not find uncontentious analogies or precedents in either domestic or international law. The purpose of this paper is to try to delineate the proper scope of non-violation complaints in the WTO system.

1.1. *The Concept of a Non-violation Complaint under GATT 1947.*

The original dispute settlement provision of the GATT was Article XXIII ⁽³⁾. This article, headed "Nullification or Impairment", remains unchanged as part of GATT 1947 which is now part of GATT 1994 ⁽⁴⁾. Article XXIII:1 provides for consultations in certain situations and Article XXIII:2 provides for the mechanisms which may be applied to those situations if consultations fail to reach a satisfactory settlement. The three sub-paragraphs of Article XXIII:1 refer to three types of situations that can give rise to consultations:

- (1) failure to carry out obligations, known as 'violation complaints'
- (2) application of any measure "whether or not" it conflicts

(1) The WTO was created by the *Marrakesh Agreement Establishing the World Trade Organization*, done Marrakesh 15 April 1994, in force 1 January 1995, 33 ILM 1144 ('WTO Agreement').

(2) For another example, see NAFTA, Article 2004 and Annex 2004.

(3) General Agreement on Tariffs and Trade, done 30 October 1947 Geneva, 61 Stat A3, TIAS No 1700, 55 UNTS 187. The GATT itself never came into force. It came into provisional operation under various Protocols. The Agreement (as amended to May 1952) is in GATT, Basic Instruments and Selected Documents ('BISD') Volume I; The pre-Uruguay round version is in BISD Vol 4 (1969).

(4) General Agreement on Tariffs and Trade 1994, Annex 1A to the WTO Agreement.

with the provisions of the Agreement, known as 'non-violation complaints'; and

(3) the existence of any other situation, known as 'situation complaints'.

and, under Article XXIII:1, it is necessary that one of these three situations must result in either of two consequences:

(1) the nullification or impairment of a benefit accruing to a Member ⁽⁵⁾ directly or indirectly under the Agreement; or

(2) the impeding of the attainment of any objective of the Agreement ⁽⁶⁾.

Consultations might result in a party removing the measure objected to or in that party giving compensation. In this context, 'compensation' has a special meaning. Compensation refers to an alternative trade liberalization given to make up for the trade liberalization which the other party contends has been nullified or impaired. Article XXIII:2 provides for referral of unresolved disputes to the Dispute Settlement Body ('DSB') ⁽⁷⁾ which shall give a recommendation or a ruling. The ultimate consequence of the dispute resolution process is that the DSB

"may authorize a Member or Members to suspend the application to any other Member or Members of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances" ⁽⁸⁾.

This retaliatory withdrawal of obligations which would otherwise be owed, sometimes referred to as sanctions, countermeasures

(5) The original GATT 1947 referred to "any contracting party" rather than a "Member", but see Article 2(a) of the GATT 1994.

(6) This six point matrix of complaints is set out in tabular form in PETERSMANN, Ernst-Ulrich, "The Dispute Settlement System of the World Trade Organization and the evolution of the GATT dispute settlement system" (1994) 31(6) *Common Market Law Review* 1157-1244 at 1172 and also in PETERSMANN, "Violation-Complaints and Non-Violation Complaints in Public International Trade Law" (1991) 34 *German Yearbook of International Law* 175-229 at 192.

(7) The original GATT 1947 referred to CONTRACTING PARTIES rather than to the Dispute Settlement Body, but see Article 2(b) of the GATT 1994 and to Article 22:2 of the Understanding on Dispute Settlement.

(8) GATT, Article XXIII:2.

or retaliation may be done on a discriminatory manner against the Member against which the complaint is made. The special feature of these criteria for consultations and, ultimately, for sanctions was that a violation was neither a necessary nor a sufficient prerequisite to the operation of Article XXIII. The necessary and sufficient condition was that there was either a "nullification or impairment of a benefit" or an "impediment to attaining objectives" ⁽⁹⁾. In GATT practice, there never was a decision of a GATT dispute settlement panel which relied on the impeding of the attainment of objectives as a basis for a recommendation or ruling under Article XXIII ⁽¹⁰⁾. Therefore, in effect, the sole criteria for the application of the dispute settlement process was the existence of nullification or impairment. The difficulty of using nullification or impairment rather than violation as a criteria resulted in the development of a presumption in violation cases ⁽¹¹⁾. The existence of nullification or impairment was presumed to have been proved on a prima facie basis wherever a violation had been proved ⁽¹²⁾. Further, in every case in which the presumption arose, it was not rebutted ⁽¹³⁾. In both violation and non-violation cases, the existence of nullification or impairment of a benefit required that there had been an adverse change to conditions of competition not an adverse change to actual

(9) See Jackson's explanation of the criteria in Article XXIII in terms of necessary and sufficient pre-requisites in JACKSON, JOHN H., *The Jurisprudence of International Trade: The DISC Case in GATT* (1978) 72 *American Journal of International Law* 747-781.

(10) See GATT, *Analytical Index - Guide to GATT Law and Practice* (GATT, Geneva, 6th ed, 1994) pp. 607-608 referring to three disputes in which the parties pleaded the impeding of objectives. Two of the disputes did not proceed and, in the third, the panel did not rule on the issue.

(11) See JACKSON, *The Jurisprudence of International Trade: The DISC Case in GATT*, as above, at 755 (though his opinion is qualified by the words "perhaps partly because of").

(12) MARTHA, RUTSEL SILVESTRE J., *Presumptions and Burden of Proof in World Trade Law* (1997) 14(1) *Journal of International Arbitration* 67-98.

(13) ROESSLER, FRIEDER, *The Concept of Nullification and Impairment in the Legal System of the World Trade Organization* ch2 in PETERSMANN, ERNST-ULRICH, *International Trade Law and the GATT/WTO Dispute Settlement System* (vol 8 in *Studies in Transnational Economic Law*) (Kluwer, London, 1997) pp. 125-142 at 127.

trade flows. Therefore, in violation cases, the presumption of nullification or impairment could not be rebutted by proof of an absence of adverse trade effects ⁽¹⁴⁾. Similarly, in non-violation cases, proof of a change in competitive conditions was required. Adverse trade effects were irrelevant or relevant only to the extent that they were evidence of a change in competitive conditions.

There are only a small number of cases in which GATT panels made recommendations upon the basis of nullification or impairment in non-violation complaints. Rulings of nullification or impairment were only made in non-violation cases where three criteria were satisfied:

- (1) that a tariff concession was negotiated;
- (2) that a subsequent measure upset the competitive relationship between the bound product and directly competitive products from other origins;
- (3) that the introduction (or variation) of the measure could not have been reasonably expected at the time the tariff concession was negotiated ⁽¹⁵⁾.

Subsequent parts of this paper discuss those panel decisions and other disputes, resolutions and practice which impact upon the scope of non-violation complaints. It is material to this process of determining the scope of non-violation complaints to assess whether all of the more general statements made above about dispute settlement under GATT 1947 are still true in respect of dispute settlement in the WTO system. This paper also analyzes the proper scope of non-violation nullification or impairment under the GATS and under the TRIPS.

1.2. *The Key Variables in Interpreting the Non-Violation Nullification or Impairment Clause.*

In considering the scope of the concept of non-violation nullification or impairment of a benefit, a number of variables arise.

(14) "United States - Taxes on Petroleum and Certain Imported Substances" ('Superfund Taxes case') panel report adopted 17 June 1987, GATT BISD 34S/136-166.

(15) Petersmann, (1991, see fn 6 above) at 225.

(a) *Benefit.*

Is the meaning of 'benefit' restricted to a benefit arising from a negotiated commitment or can benefit include any benefit that arises from any provision of the Agreement?

(b) *Subsequent Measures.*

Does the nullification or impairment clause only provide protection in the case of subsequent measures or does the clause provide protection in the case of the maintenance of pre-existing measures which nullify or impair a benefit?

(c) *Measures and Omissions.*

Does the clause protect only against positive adoption of measures or does it protect against the failure to adopt a measure to guard against nullification or impairment?

(d) *Measures of Government or Actions of Private Parties.*

Does the clause protect only against nullification or impairment that is caused by a government measure or does it protect against nullification or impairment that is caused by actions of private entities?

(e) *Reasonableness and Legitimacy of Expectations.*

Is the protection of the clause limited to those benefits that were reasonably expected? If so, should reasonable expectations be a subjective or an objective determination? Should it be a determination of what one party expected or what both parties to an exchange of concessions expected or what all parties to a multilateral exchange of obligations or concessions expected? Must the expectations be legitimate? Are expectations legitimate if they are reasonable or does legitimacy require satisfaction of some criteria in addition to reasonableness?

(f) *Upsetting Competitive Position or Trade Flows.*

Does the clause protect unexpected detriment to trade flows or to relative competitive position?

(g) *Measures Conforming to Specific Exceptions.*

Is it possible for a measure that conforms to a specific exception in one of the agreements to nullify or impair a benefit under that agreement?

(h) *Measures Conforming to Requirements of One of the Specific Agreements on Multilateral Trade in Goods.*

This is a new issue that arises from the presence in the WTO Agreements of additional agreements dealing with specific aspects of the GATT.

1.3. *The Importance of Determining the Proper Scope of Non-Violation Complaints in the WTO System.*

Determining the scope of non-violation nullification or impairment in the WTO system is important partly because there is such an enormous difference between the narrow view and the broad view as to the proper role for these type of complaints. The narrow view would be constrained by the three criteria mentioned above that have been developed in the course of GATT disputes. A more constrained view might limit these complaints to domestic subsidies and an even more constrained view would limit them to domestic subsidies which completely counteract the market opening effects of a tariff binding. In contrast, the potential scope of these complaints is very broad, even "staggering" ⁽¹⁶⁾. The words of Article XXIII:1(b) could be interpreted to affect a variety of domestic policy measures that have some impact on international trade. Some examples would be laws and policies relating to competition ⁽¹⁷⁾,

(16) TAYLOR, C. O'NEAL, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System* (1997) 30(2) *Vanderbilt J of Transnat'l L* 209-348 at 280.

(17) See HOEKMAN & MAVROIDIS, *Competition, Competition Policy and the GATT* (1994) 17(2) *World Economy* 121-250, HINDLEY, *Competition Law and the*

environmental standards ⁽¹⁸⁾, labour standards, or product safety standards. Any of these kinds of regulation might have an impact on conditions of competition between sellers of domestically made products and sellers of foreign products. Therefore, a broad interpretation of Article XXIII:1(b) would have an pervasive impact on many areas of domestic commercial policy.

Importantly then, the scope of non-violation complaints has an impact on whether the international legal consequences of compensation and retaliation can attach to the choice of domestic policy measures. Of course, if specific treaty obligations have been entered into in respect of those matters of domestic policy, then international legal consequences will follow. This situation exists with respect to such domestic policies as are the subject of specific WTO agreements, like the agreements on technical barriers, customs valuation or sanitary and phytosanitary measures ⁽¹⁹⁾. Such agreements prevent those domestic policies from undermining market access commitments ⁽²⁰⁾. However, in the absence of treaty provisions which expressly link trade compensation or retaliation to the choice of domestic policy, then whether trade compensation or retaliation can be a legal consequence of domestic policy choices depends upon the breadth of the concept of non-violation nullification or impairment under WTO law.

1.4. *Alternative Approaches to the Nullification or Impairment Problem.*

It is useful to consider the problem which the nullification or impairment clause is intended to solve and the possible ways of

WTO: *Alternative Structures for Agreement* ch7 in BHAGWATI & HUDEC, *Fair Trade and Harmonization - Pre-requisites for Free Trade* (MIT, Cambridge, Mass., 1994), Volume 2, pp. 333-348.

(18) See TIETJE, *Voluntary Eco-Labeling programmes and Questions of State Responsibility in the WTO/GATT Legal System* (1995) 29(5) *JWT* 123-158 at 151-155.

(19) "Agreement on Technical Barriers to Trade", "Agreement on Implementation of Article VII of the GATT 1994", "Agreement on the Application of Sanitary and Phytosanitary Measures", being in Annex 1A of the *WTO Agreement*.

(20) Roessler (1997) at p. 133 (see fn13).

dealing with it. In undertaking tariff negotiations, parties need to construct an agreement to govern the exchanges of tariff bindings. In doing so, they attempt to exclude conduct that would circumvent the tariff bindings. What are the possible ways of constructing such an agreement? There are at least the following three approaches:

(1) One approach would be to consider everything that your negotiating partners might possibly do that would impair tariff bindings and to add specific clauses in the text of the agreement prohibiting these actions. For example, clauses could be included to prohibit domestic subsidies or to require enforcement of competition laws.

(2) A second approach would be that in the negotiation of each particular binding, you consider everything that your negotiating partner might possibly do to impair the benefit of their bindings and to cover these things in the individual country Schedules of Concessions either by adding additional obligations in other country's Schedules or by expressing your own bindings to be conditional upon other parties not doing any of those things. Using the same examples, a party might make its binding subject to a negotiating party not maintaining a domestic subsidy on a particular product or subject to the negotiating party enforcing its competition law or it might require other parties to include in their Schedules a commitment not to maintain a domestic subsidy or to enforce their competition law.

(3) A third approach would be to incorporate into the agreement a catch-all provision that has the effect of making your own binding conditional upon your negotiating partner not doing anything that nullifies or impairs the benefits that you receive from your negotiating partner's tariff bindings. With this method, the parties would have to decide on the appropriate wording for the clause. Such a clause might have the effect of making one party's bindings contingent upon the other party not maintaining a domestic subsidy or enforcing its competition law but it depends on the scope of the clause.

The first two approaches suffer from the disadvantage that it may not be possible to think of every possible government policy that might impair the benefit of a tariff binding. The third approach suffers from the disadvantage that the catch-all provision might result in the release from obligations in unintended situations.

There is a fundamental difference between the second approach of negotiating specific conditions and the third approach of a catch-all clause. Under the second approach, there would be an onus on each party to negotiate restrictions of specific non-violation measures wherever they wished their own obligations to be subject to their trading partners not adopting such measures. Unless a particular non-violation measure was dealt with in the Schedules, then the maintenance of that non-violation measure could not be a justification for being released from the binding. Under the third approach, there would be an onus on parties to specify that they reserve the right to adopt a certain non-violation measure wherever they wished to be certain that such measure should not be a justification for a negotiating partner being released from their binding. The fundamental difference between the two approaches is different placement of the onus to ensure that a specific matter is dealt with in the schedules to the treaty. Various combinations of the three approaches would be possible. The Agreement could contain clauses which prohibit certain conduct. For such types of conduct, it would not be necessary to make bindings specifically subject to not engaging in the prohibited conduct. Other types of conduct could still be dealt with in schedules. A further possibility might involve the inclusion of a catch-all clause with some types of measures being excluded from its scope.

2. *Non-violation complaints in the text of the Agreement Establishing the WTO.*

The concept of non-violation complaints has been retained by the Agreement Establishing the World Trade Organization ('WTO Agreement') ⁽²¹⁾. Under that Agreement, all of the Members of the WTO are bound by all of the Multilateral Trade Agreements listed in Annexes 1, 2 and 3 of the Agreement ⁽²²⁾. These include the GATT and other Multilateral Agreements on Trade in Goods in Annex 1A, the General Agreement on Trade in Services ('GATS') in

(21) Agreement Establishing the World Trade Organization, see fn 1.

(22) WTO Agreement, Article II:2.

Annex 1B, the Agreement on Trade-Related Aspects of Intellectual Property ('TRIPS') in Annex 1C and the Understanding on Rules and Procedures Concerning the Settlement of Disputes ('Dispute Settlement Understanding' or 'DSU') in Annex 2. The DSU applies to all 'covered agreements' which is defined to include all of the multilateral agreements on trade in goods as well as the GATS and the TRIPS⁽²³⁾. Many of the covered agreements also contain provisions on dispute settlement and the DSU sets out the hierarchy to apply in the case of conflicts between provisions of the DSU and other provisions⁽²⁴⁾. It is proposed to describe, first, some of the general provisions of the DSU and then, the specific parts of the TRIPS, the GATS and the GATT which affect non-violation complaints.

2.1. *The Dispute Settlement Understanding.*

There are some fundamental differences between the dispute settlement mechanism operating under the DSU from that which applied under GATT 1947. One fundamental difference is the application of the negative consensus principle: decisions of the DSB are automatic unless there is a consensus against⁽²⁵⁾. Consensus means that no Member objects. Therefore, it is no longer possible for a losing litigant to block adoption of a report or to block the authorization of countermeasures. Another fundamental difference emerges from an analysis of the different way that the DSU applies to violation and non-violation complaints. With respect to violation complaints, the DSU effects a revolutionary change to the system. If a panel or the Appellate Body finds that a violation exists,

(23) DSU Article 1(1) and Appendix 1.

(24) See DSU Article 1(2) and the provisions listed in Annex 2. Under those provisions, certain of the more specific provisions of some of the covered agreements (notably not including Article XXIII of the GATT) are accorded clear priority and, for all other more specific provisions, a tie breaker procedure is established.

(25) The DSB is established pursuant to Article IV:3 of the WTO Agreement. The DSB is composed of the same membership as the General Council which is established under Article IV:2 of the WTO Agreement. The application of a negative consensus principle is required under Articles 16(4) (relating to adoption of reports) and 17 (relating to authorization of countermeasures).

then it must make a recommendation that the Member concerned bring the measure into conformity with the relevant agreement ⁽²⁶⁾. The finding that a violation exists is the only prerequisite to a panel making the recommendation. It is not necessary that the panel also find that the violation results in either the nullification or impairment of a benefit or the impeding of an objective. Whatever scope of operation remains for those criteria, they no longer apply to violation complaints ⁽²⁷⁾. Thirdly, the provision for cross-retaliation, that is, authorization of retaliation under a different covered agreement from the agreement under which the dispute arose, has significant ramifications. This factor means that the scope of non-violation complaints under any one agreement (GATT, GATS or TRIPS) not only affects the impact of the WTO on domestic policy under the relevant treaty field but also affects the scope of the situations the WTO makes available to Members to escape on a discriminatory basis from obligations under the other two treaties.

The DSU makes special provision in Articles 26(1) and 26(2), respectively, for non-violation complaints under Article XXIII:1(b) of GATT and for situation complaints under Article XXIII:1(c). These are considered in more detail below.

2.2. *Agreement on Trade-Related Aspects of Intellectual Property.*

In the TRIPS, dispute settlement is provided for in Article 64. This article provides that Articles XXII and XXIII of the GATT apply to disputes under the TRIPS. However, Article 64(2) excludes non-violation complaints under Article XXIII:1(b) and situation complaints under Article XXIII:1(c) from the TRIPS for the first 5 years of the WTO. This exclusion will operate until 1 January 2000. Article 64(3) asks the Council on TRIPS to make recommendations

(26) DSU, Article 19(1).

(27) The author submits that the effect of Article 19(1) is not restricted or limited by Article 3(8). Roessler arrives at the same result by a different approach arguing that the presumption that a violation causes nullification or impairment is not rebuttable, but he seems to be assuming that nullification or impairment is still relevant to violations: see Roessler (1997) p. 130 (see fn13).

to the Ministerial Conference on whether this exclusion of non-violation and situation complaints should be removed, modified or extended. Article 64(3) further provides that such recommendations may only be adopted by consensus.

The obvious question here is, "what happens if by 1 January 2001, the Ministerial Conference has not adopted a decision on the application of non-violation or situation complaints?" One argument would be that since Article 64(3) contemplates that the situation after expiration of the 5 years is to be determined by the Ministerial Conference, then non-violation complaints and situation complaints cannot be incorporated into TRIPS except by decision of the Ministerial Conference. However, the words of Article 64 do not contain an express requirement that there be any positive act or confirmation in order to incorporate non-violation complaints and situation complaints into the TRIPS. A second argument would be that, if by 1 January 2001, the Ministerial Conference has not adopted a decision, then the application of Article 64(2) would lapse. That would leave Article 64(1) as applying the whole of Article XXIII of the GATT including paragraphs XXIII:1(b) and (c). This view appears to be the ordinary meaning of the words. However, it should be considered in the context of the referral of this question to the Ministerial Council.

2.3. *General Agreement on Trade in Services.*

In the GATS, there is a clear distinction between violation complaints and non-violation complaints. For violation complaints, the existence of a violation is a sufficient condition for a complaint; the notion of nullification or impairment is entirely absent from the criteria for establishing a violation complaint. Non-violation complaints are provided for in Article XXIII:3. It applies where:

"any member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement [under which specific sectoral commitments are made] is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement".

It provides for a mutually satisfactory adjustment on the basis of Article XXI of the GATS which might include either compensation or modification or withdrawal of the measure and, in the absence of agreement on a mutually satisfactory adjustment, for authorization of countermeasures under Article 22 of the DSU.

The wording of Article XXIII:3 of the GATS incorporates two of the abovementioned three criteria which arguably limit the scope of non-violation complaints under Article XXIII:1(b) of the GATT. First, under this provision, the meaning of 'benefit' is restricted to a benefit arising from a negotiated services commitment included in a Members Schedule of Specific Commitments just as, under the GATT, the meaning of benefit, arguably, is restricted to a benefit arising from a negotiated tariff concession included in a Members Schedule of Concessions. Secondly, under this provision, benefits are limited to those which a Member "could reasonably have expected to accrue to it" under a specific commitment. This corresponds to the alleged reasonable expectations criteria under the GATT or at least to one interpretation of it. The third of the alleged criteria under the GATT, that the nullification or impairment should arise from a subsequent measure is not incorporated into Article XXIII:3 of the GATS, the wording of which refers to the "*application* of" rather than, say, the *introduction* "of any measure".

2.4. *Multilateral Agreements on Trade in Goods - GATT 1994.*

The Multilateral Agreements on Trade in Goods consist of the GATT 1994 and also all of the other Agreements on Goods which are listed in Annex 1A of the WTO Agreement ⁽²⁸⁾. The GATT 1994 consists of the GATT 1947 plus instruments adopted under GATT

(28) The other Multilateral Agreements on Trade in Goods are: (1) Agreement on Agriculture; (2) Agreement on the Application of Sanitary and Phytosanitary Measures; (3) Agreement on Textiles and Clothing; (4) Agreement on Technical Barriers to Trade; (5) Agreement on Trade-Related Investment Measures; (6) Agreement on Implementation of Article VI of the GATT 1994; (7) Agreement on Implementation of Article VII of the GATT 1994; (8) Agreement on Preshipment Inspection; (9) Agreement on Rules of Origin; (10) Agreement on Import Licensing Procedures; (11) Agreement on Subsidies and Countervailing Measures; (12) Agreement on Safeguards.

1947, the 1994 Marrakesh Protocol of Schedules of Concessions, and a set of Understandings relating to specific provisions of the GATT ⁽²⁹⁾.

Article XXIII is still the principal dispute settlement provision of the GATT 1994. In addition, some of the Understandings have specific clauses on the application of Article XXIII to the subject matter of the Understanding. Some of the other Multilateral Agreements on Trade in Goods have additional provisions on dispute settlement. In the case of any conflict between the GATT and another of the Multilateral Agreements on Goods, the more specific agreement prevails ⁽³⁰⁾.

Article XXIII has not been amended so the words of Article XXIII:1(b) on non-violation complaints and of Article XXIII:1(c) on situation complaints are unchanged. However, Articles 26(1) and 26(2) of the DSU respectively contain special provisions relating to the operation of Articles XXIII:1(b) and (c). Therefore, the non-violation provisions of Article XXIII must be read in conjunction with: the general provisions of the DSU; the particular provisions of Article 26 of the DSU; and some specific provisions of the Understandings.

2.4.1. *Non-Violation Complaints Under Article 26(1) of the DSU.*

For situations to which Article XXIII:1(b) applies, Article 26(1) of the DSU provides that:

(1) the complainant must present a detailed justification in support of a complaint relating to a non-violation measure that

(29) See GATT 1994, paragraph 1. The Understandings are: (1) Understanding on the Interpretation of Article II:1(b) of the GATT 1994; (2) Understanding on the Interpretation of Article XVII of the GATT 1994; (3) Understanding on Balance of Payments Provisions of the GATT 1994; (4) Understanding on the Interpretation of Article XXIV of the GATT 1994; (5) Understanding in Respect of Waivers of Obligations under the GATT 1994; (6) Understanding on the Interpretation of Article XXVIII of the GATT 1994.

(30) See the General Interpretative note to Annex 1A of the WTO Agreement at the beginning of Annex 1A "Multilateral Agreement on Trade in Goods".

allegedly nullifies or impairs a benefit under, or impedes the attainment of objectives under the relevant covered agreement ⁽³¹⁾;

(2) the panel or Appellate Body cannot order removal of the measure and there is no obligation to remove the measure; ⁽³²⁾.

(3) the panel or Appellate Body can recommend that the Member concerned may make a mutually satisfactory adjustment ⁽³³⁾;

(4) either party can request an arbitration to make a determination of the level of benefits which have been nullified or impaired ⁽³⁴⁾.

It is critically important that there cannot be any obligation to remove the non-violation measure. There can only be an obligation to try to negotiate a mutually satisfactory adjustment which means either giving compensation or removing the measure or some combination of the two. The final paragraph of Article 26(1) provides:

“(d) notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute”.

The purpose of that paragraph is to counter any implication that might be made from the provisions of Article 22(1), that there might be an obligation to change the non-violating measure. Article 22(1) is an ambiguous provision that reflects the contention in the Uruguay Round negotiation as to whether the objective of the dispute settlement process is to achieve compliance with the WTO Agreements or is to give parties a genuine choice between the three options of either conforming to the WTO Agreement, giving compensation or being exposed to retaliation ⁽³⁵⁾. It provides that

(31) DSU, Article 26:1(a). This reiterates the requirement set out in paragraph 5 of the Annex to the Understanding on Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979; BISD 26S/210.

(32) DSU, Article 26:1(b).

(33) DSU, Article 26:1(b).

(34) DSU, Article 26:1(c).

(35) See, eg, PORGES, Amelia, *The New Dispute Settlement: From the GATT to the WTO* (1995) *Leiden Journal of International Law* 115-133 (at 123, saying in relation to violation complaints that the “objective is not to re-balance obligations, but to achieve compliance with the rules”. Cf BELLO, Judith Hippler, *The WTO Dispute Settlement Understanding: Less Is More* (1996) 90 *The American Journal of International Law* 416-418 (saying that a defendant has a choice between

compensation and retaliation are temporary measures neither of which is "preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements". Article 22(1) might be interpreted (wrongly, I would submit) to mean that even in non-violation complaints, after the giving of compensation or the imposition of countermeasures, there remains an obligation to remove the measure which has caused the nullification or impairment. Therefore, paragraph 26(1)(d) makes doubly certain that after compensation is given, that is the end of the dispute and there is no possibility of a Member being required to remove the non-violation measure in the future.

It is important to take note that the provisions of the DSU requiring automatic decisions to be made except in the case of a negative consensus *do* apply to non-violation complaints. Therefore, even in the case of a non-violation, the DSB must adopt the panel report (in the absence of appeal) or the Appellate Body report unless there is a consensus against doing so ⁽³⁶⁾ and, if a mutually agreed solution is not reached, then upon request, the DSB must authorize retaliation unless there is a consensus against doing so ⁽³⁷⁾.

2.4.2. *Situation Complaints under Article 26:2 of the DSU.*

Situation complaints are dealt with differently from non-violation complaints. The crucial difference is that the rules and procedures of the DSU only apply to the complaint up to the point of distribution of a panel report ⁽³⁸⁾. Therefore, the new rules on negative consensus voting do not apply to the adoption of a panel or Appellate Body report or the authorization of countermeasures in

bringing measures found to be in violation of the Agreement into conformity with the Agreement or giving compensation or risking countermeasures). This point is discussed and all relevant provisions of the DSU are listed in JACKSON, JOHN H., *Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects* in KRUEGER, Anne O. (ed.). *WTO as an International Organization* (The University of Chicago Press, Chicago & London, 1998) pp. 161-180, esp at pp. 169-170.

(36) DSU, Articles 16:4 & 17:14.

(37) DSU, Article 22:6.

(38) Article 26:2, second sentence.

the case of a 'situation complaint'. In addition, a panel cannot treat a dispute as a 'situation complaint' under Article XXIII:1(c) unless it determines that neither paragraphs 1(a) or 1(b) are applicable.

2.4.3. *The Understandings Incorporated in GATT 1994.*

Three of the Understandings which are part of GATT 1994 specifically provide that the subject matter of the understanding is subject to the dispute settlement provisions of Article XXIII "as elaborated and applied by the Dispute Settlement Understanding" ⁽³⁹⁾. One of the Understandings expressly confirms the availability of non-violation complaints ⁽⁴⁰⁾ and the other two do so implicitly by making Article XXIII applicable ⁽⁴¹⁾.

2.5. *Other Multilateral Agreements on Trade in Goods.*

The provisions relating to non-violation complaints in the Multilateral Agreements on Trade in Goods other than the GATT 1994 can be classified four ways.

2.5.1. *Agreements which simply incorporate the operation of Article XXIII without adding further provisions.*

The *Agreement on Trade-Related Investment Measures* ⁽⁴²⁾, the *Agreement on Preshipment Inspection* ⁽⁴³⁾, the *Agreement on Rules of Origin* ⁽⁴⁴⁾; the *Agreement on Import Licensing Procedures* ⁽⁴⁵⁾,

(39) See Understanding on the Interpretation of Article II:1(b) of the GATT 1994, para 6; Understanding on the Interpretation of Article XXIV of the GATT 1994, para 12; Understanding in Respect of Waivers of Obligations under the GATT 1994, para 3.

(40) See Understanding in Respect of Waivers of Obligations under the GATT, para 3.

(41) See Understanding on the Interpretation of Article II:1(b) of the GATT 1994, para 6 and Understanding on the Interpretation of Article XXIV of the GATT 1994, para 12.

(42) Agreement on Trade-Related Investment Measures, Article 8.

(43) Agreement on Preshipment Inspection, Article 8.

(44) Agreement on Rules of Origin, Article 8.

(45) Agreement on Import Licensing Procedures, Article 6.

the *Agreement on Safeguards* (*Safeguards Agreement*) ⁽⁴⁶⁾ all incorporate the provisions of Article XXIII "as elaborated and applied by the Dispute Settlement Understanding" ⁽⁴⁷⁾.

2.5.2. *Agreements which incorporate the operation of Article XXIII but which also add further dispute settlement provisions.*

In the following agreements, dispute settlement is subject to Article XXIII as elaborated and applied by the DSU except as otherwise provided.

The *Agreement on Subsidies and Countervailing Measures* ('SCM Agreement') provides for remedies, including multilaterally authorized countermeasures, in response to non-violation subsidies ⁽⁴⁸⁾. However, it makes a distinction between actionable and non-actionable subsidies ⁽⁴⁹⁾. In the case of non-actionable subsidies, the SCM Agreement removes the possibility of multilaterally authorized countermeasures and also prohibits countervailing duties ⁽⁵⁰⁾. Subsidies are "non-actionable" if they are given generally rather than specifically to a particular enterprise or industry or group of enterprises or industries ⁽⁵¹⁾; or if they are specific, but fall within one of three categories, (a) certain research subsidies ⁽⁵²⁾; (b) certain subsidies to a disadvantaged region ⁽⁵³⁾; or (c) certain subsidies to convert to more environmentally friendly production ⁽⁵⁴⁾.

(46) Agreement on Safeguards, Article 14.

(47) These words are employed in each of the agreements listed here.

(48) Agreement on Subsidies and Countervailing Measures ('SCM Agreement') Part III.

(49) Non-actionable subsidies are defined in Article 8 of the SCM Agreement.

(50) See SCM Agreement, Articles 8.1, 8.2, 10 and footnote 35. Note also the exception in Article 9 relating to multilaterally authorized countermeasures but not to countervailing duties.

(51) See SCM Agreement, Article 8.1(a) and the criteria for specificity in Article 2.

(52) SCM Agreement, Article 8.2(a).

(53) SCM Agreement, Article 8.2(b).

(54) SCM Agreement, Article 8.2(c).

The *Agreement on Agriculture* ('Agriculture Agreement') provides that Article XXIII and the DSU do apply to disputes under that Agreement ⁽⁵⁵⁾. Domestic subsidies on agricultural products might possibly be challenged under Article XXIII:1(b) of GATT 1994 or under Part III of the SCM Agreement. However, the Agriculture Agreement limits the scope of non-violation complaints with respect to domestic subsidies on agricultural products during the period of implementation of the Agriculture Agreement. Both the application of Article XXIII:1(b) and the application of Part III of the SCM Agreement are excluded from domestic subsidies that are, either within certain exempt categories or are in conformity with reduction commitments ⁽⁵⁶⁾. It is also arguable that export subsidies on agricultural products could be challenged under Article XXIII:1(b) or under Part III of the SCM Agreement, though not squarely on the basis of historical rulings on non-violation claims. However, the Agriculture Agreement also excludes such challenges against export subsidies ⁽⁵⁷⁾.

In the *Agreement on the Application of Sanitary and Phytosanitary Measures* ('SPS Agreement'), and in the *Agreement on Technical Barriers to Trade* ('TBT Agreement'), there are some additional dispute settlement provisions relating to issues of a technical nature. Generally though, Article XXIII does apply to these agreements and non-violation complaints would be possible.

2.5.3. *Agreements which establish dispute settlement provisions without reference to Article XXIII.*

In both the *Agreement on Anti-Dumping Duties* and the *Agreement on Customs Valuation*, there is no mention of Article XXIII of the GATT but there are alternative provisions which employ the language of nullification or impairment ⁽⁵⁸⁾. The adoption of the

(55) Agreement on Agriculture, Article 19.

(56) Article 13(a)(ii) & (iii) and (b) (ii) & (iii).

(57) Agreement on Agriculture, Article 13(c)(ii).

(58) Agreement on Implementation of Article VI of the GATT 1994 ('Agreement on Anti-Dumping Duties') Article 17:3. Agreement on Implementation of Article VII of the GATT 1994 ('Agreement on Customs Valuation') Article 19:2.

nullification or impairment criteria suggests that non-violation complaints may be possible. However, it might be possible to argue an intention to exclude non-violation complaints upon the basis of the non-adoption of the whole of Article XXIII in contrast to some of the other Agreements and the absence of any words like "whether or not a violation".

2.5.4. *The one Agreement which establishes dispute settlement provisions and incorporates part only of Article XXIII.*

The *Agreement on Textiles and Clothing* creates its own type of non-violation complaint ⁽⁵⁹⁾. The provisions are complex and, since they create a transitional regime due to expire on 1 January 2005, it is not proposed to consider them here.

2.6. *How is the Nullification or Impairment Problem Dealt With?*

The GATT and the GATS adopt a combination of the three methods of dealing with the problem of nullification or impairment. A number of articles of the GATT and the GATS prohibit certain conduct that would circumvent tariff bindings or specific commitments. In addition, schedules can be used to effect additional restrictions or to qualify scheduled commitments or concessions. Schedules may, in the case of GATS, contain commitments on any measures affecting trade in services and, in the case of GATT, may contain commitments on matters other than tariffs although the exact boundaries of this freedom are untested. In addition, the GATT and the GATS each contain a catch-all clause, respectively in Article XXIII:1(b) & (c) and Article XXIII:3. The GATT also contains provisions which limit the scope of the catch-all clause by excluding certain measures from being the subject of non-violation complaints.

(59) *Agreement on Textiles and Clothing*, Articles 4, 5 & 8.

3. *The law relating to the interpretation of treaties and the Agreement Establishing the WTO.*

The provisions on non-violation complaints must be interpreted in accordance with the law relating to treaties. The DSU provides that the dispute settlement system of the WTO should serve to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law" ⁽⁶⁰⁾. There is a widespread and prevailing view that Articles 31 and 32 of the Vienna Convention on the Law of Treaties ⁽⁶¹⁾ represent customary international law on interpretation of treaties even if not all of it ⁽⁶²⁾. Indeed, the WTO Appellate Body has declared that both Articles 31 and 32 do represent customary international law ⁽⁶³⁾. Therefore, relations under the WTO Agreement, even among those Members that are not parties to the Vienna Convention, should be based on interpretation of the WTO Agreement in accordance with Articles 31 and 32 of the Convention. Under Articles 31 and 32, it is necessary to consider:

- (1) the terms of the treaty;
- (2) the terms of the treaty in the context of the whole treaty;
- (3) the terms of the treaty in the light of the object and purpose of the treaty;
- (4) any agreement between the parties regarding the interpretation or application of the treaty;
- (5) "any subsequent practice in the application of the treaty

(60) DSU, Article 3:2.

(61) *Vienna Convention on the Law of Treaties*, done Vienna, 23 May 1969, in force generally 27 January 1980, ATS 1974 No 2, UKTS No 58, UNTS 1155 p. 331.

(62) Eg, see SIMMA, BRUNO (ed) *The Charter of the United Nations - A Commentary* (Oxford University Press, Oxford, 1984) p. 30 and the authorities cited there in footnote 37.

(63) See "United States - Standards for Reformulated and Conventional Gasoline" WT/DS2/9, 20 adopted 20 May 1996 at p. 17 (the text footnoted by footnote 43) (and the references referred to in footnote 43) declaring that Article 31 had "attained the status of a rule of customary or general international law" and see Japan - Taxes on Alcoholic Beverages AB-1996-2 adopted 4 October 1996 at p. 11 (the text footnoted by footnote 17 of the report) (and the references referred to in footnote 17) declaring that Article 32 "had also attained the same status".

which establishes the agreement of the parties regarding its interpretation”;

(6) relevant rules of international law;

(7) in circumstances of ambiguity or obscurity, the preparatory work.

It is proposed to proceed to analyze the provisions upon which non-violation complaints may be based by going through the elements referred to in Articles 31 and 32 of the Vienna Convention. Some additional matters of treaty interpretation deserve comment.

(i) The practice of dispute settlement panels puts considerable emphasis on the object and purpose: for example, in arriving at the least restrictive or ‘proportionality’ criteria in the Section 337 case ⁽⁶⁴⁾, or in arriving at the ‘single undertaking’ approach in the Coconuts decision ⁽⁶⁵⁾.

(ii) Although it has been argued that GATT panels have tended to have a reliance on travaux préparatoires that exceeds that permissible under general international law and under the Vienna Convention ⁽⁶⁶⁾, the Convention does, in fact, permit recourse to travaux préparatoires in reasonably broad circumstances.

(iii) Although it has been argued that the emphasis given by Article 31 to text, context and purpose is intended to “expand the normative scope of treaties, to the detriment of the old principle whereby, in case of doubt, limitations of sovereignty were to be strictly interpreted” ⁽⁶⁷⁾, it is submitted that the presumption against sovereign freedom of action is not excluded by Article 31 and may be relevant to interpretation of the WTO Agreement.

(iv) Articles 31 and 32 do not exclude the concurrent applica-

(64) “United States Section 337 of the Tariff Act of 1930”, (1988-89) BISD 36S/345 (see HALLSTROM, *The GATT Panels and the Formation of International Trade Law*, (Juristforlaget, Stockholm, 1994) pp. 188-192).

(65) “Brazil - Measures Affecting Desiccated Coconut” WT/DS22/AB/R dated 21 February 1997, Report of the Appellate Body AB-1996-4. See pages 18-21 under the heading “3. Object and Purpose of the WTO Agreement”.

(66) See KUYPER, PJ, *The Law of GATT as a Special Field of International Law - Ignorance, further refinement or self-contained system of international law?* (1994) XXV NYIL 227-257 at 229.

(67) CASSESE, ANTONIO, *International Law in a Divided World* (Clarendon Press, Oxford, 1986) p. 191.

tion of the principle of effectiveness in treaty interpretation, that words should not be interpreted so as to deprive them of effect⁽⁶⁸⁾, but some particular aspects of the WTO may be relevant to the use of this principle. First, in WTO negotiations, sometimes text is incorporated into negotiating texts precisely for the reason that the words are capable of bearing different interpretations because without the adoption of words that all participants in the negotiation could, at least temporarily, accept then there would be no possible way for participants to agree that a draft text could be used as the basis for continuing negotiations. It cannot always be said with perfect confidence that such constructive ambiguities have been removed by the time that the final text is agreed. A second consideration in WTO negotiations is that where a provision no longer has any application, it may be that participants are unable to agree on deleting it.

4. *Literal interpretation of the non-violation complaint provisions.*

It is proposed to illustrate the broad scope of a literal interpretation of the words "nullification or impairment of a benefit" by setting out some examples. The examples are founded on a literal interpretation of nullification or impairment of benefits and no attempt is made to cull situations from the list because they would not fit within those words if interpreted in a more sophisticated way.

4.1. *Subsidies.*

Export Subsidies — Under the GATT, export subsidies are violations. Under the GATS, though, export subsidies are not violations. It might be argued that where an export subsidy by one

(68) See JENNINGS & WATTS (eds), *Oppenheim's International Law* (9th ed 1992) p. 1280-1281 on the maxim *ut res magis valeat quam pereat*. Note that the content of the principle of effectiveness is not perfectly clear. See, for example, references to the principle as bearing some relationship with the teleological approach in that the object must be given effect to (see DIXON, MARTIN, *Textbook on International Law* (Blackstone Press, London 2nd ed, 1993) p. 58 & O'Connell, DP, *International Law* (Stevens & Sons, London, Oceania Publications, Dobbs Ferry, New York, Law Book Co, Sydney, 1965) p. 273).

Member displaces exports of services of a second Member in the market of a third Member, the export subsidy is impairing the benefit that the second Member could have expected under a specific commitment of the third Member (69).

Subsidies Linked to Production — The introduction of a domestic production subsidy might impair a benefit under a tariff binding because it would increase the relative competitiveness in the domestic market of domestic producers in relation to foreign producers. Similarly, a subsidy paid contingent upon the provision of a service might impair a benefit under a specific commitment relating to that service (70).

Subsidies to Producers of Particular Products Not Linked To Production — A subsidy that is not directly linked to the production or sale of a particular product but is paid to a particular group of producers may be regarded as impairing a tariff binding because it may affect the price at which domestic producers are prepared to sell. Similarly, a subsidy paid to a group of service providers may impair a specific commitment.

Subsidies Not Linked Directly To Specific Production or Producers — The introduction of a subsidy not directly linked to specific production or services or to particular producers or suppliers, like a generally available subsidy to the cost of an input like electricity, research or transport, might impair a negotiated commitment by increasing the relative competitiveness of domestic producers compared with foreign producers.

4.2. Domestic Taxes.

Sales Taxes - On imports — The introduction of a sales tax on imports of a product subject to a tariff binding would impair the

(69) See the argument made in BARCELO III, JOHN J., *Subsidies and Countervailing Duties - Analysis and a Proposal* (1977) 9 *Law & Policy in International Business* 779-853 at 847 that there would be a reasonable expectation that access to an export market will not be impaired by a production subsidy in a third country. The argument applies a fortiori to export subsidies.

(70) This is the type of subsidy referred to in Barcelo (1977), as above, at 847.

benefit of a tariff binding because it would diminish the relative competitiveness of imports with domestic product. Similarly, a sales tax on the provision by foreign service providers of a service subject to a specific commitment would impair the benefit of the specific commitment.

Sales Tax on a product regardless of source — The introduction of a sales tax on a product subject to a tariff binding, whether from foreign or domestic sources, might be regarded as impairing the benefit of a tariff binding because it might reduce the sales of the product including import sales. Similarly, the introduction of a sales tax on the provision, whether by nationals or foreigners, of a service subject to a specific commitment might be regarded as impairing the benefit of the specific commitment because it might reduce the sales of the service, including by foreign service providers.

Income Tax - Non-Discriminatory — Similarly, an increase in the rate of income tax might be regarded as impairing the benefit of a tariff binding or specific commitment because the tax increase might reduce consumer demand generally and, consequently, the sales of a product or service to which a binding or commitment relates.

4.3. *Import Barriers.*

Import Prohibitions and Quotas — The introduction of an import prohibition would completely nullify the market access gained from a tariff binding. The introduction of an import quota which restricts the quantity of imports to less than that which would otherwise flow would impair a tariff binding. Even a quota larger than the present quantity of imports would impair the market access that might be gained from a tariff binding because, in the future, it might restrict the quantity of imports. Similarly, the application of an unscheduled quota on the provision of a service by non-nationals would impair the benefit of a specific commitment.

Variable Tariff Rates — Changing of tariff rates in a way that controls the quantity of imports might impair the benefit that should flow from the rule prohibiting quantitative restrictions and, for that reason, be regarded as impairing a benefit under the GATT.

4.4. *Import Barriers Conforming to Exceptions or Specific Agreements.*

A literal interpretation of the non-violation provisions would extend them to measures which are not violations specifically for the reason that the relevant measures are in conformity with express exceptions in the agreement.

Restrictions for Balance of Payments Purposes — Quantitative restrictions on imports of goods or the provision of services by non-nationals which are imposed for balance of payments purposes in accordance with Articles XII or XVIII B of the GATT or Article XII of the GATS might impair the benefit respectively under a binding or commitment.

Restrictions Conforming to One of the General Exceptions — For example, restrictions to protect human health either on goods conforming to Article XX(b) of the GATT or on provision of services conforming to Article XIV(b) of the GATS might impair the benefit, respectively, under a tariff binding or under a commitment.

Restrictions Covered by a Waiver — Restrictions which are not violations by virtue of a waiver under Article XXV of the GATT or under Article IX of the WTO Agreement might impair the competitive position existing under a binding or commitment.

Discrimination Conforming to the Exceptions for Free Trade Areas — A free trade area conforming to Article XXIV of the GATT would not be in violation of Article I but it might be regarded as impairing benefits accruing under the GATT because the zero tariffs applied between members of the free trade area would alter the competitive conditions for non-members accruing from Article I and under bindings given by a member of the free trade area. Similarly, a free trade area conforming to Article V of the GATS would not be a violation of Article II but it might be regarded as impairing benefits under the GATS because the national treatment applied between members of the free trade area would alter the competitive conditions for non-members accruing from Article II and under commitments given by a member of the free trade area.

Anti-Dumping Duty — An anti-dumping duty conforming with Article VI would not be a violation but might be regarded as

impairing the benefit under a binding because it alters the competitive conditions between suppliers in the country against whom the anti-dumping duty is applied and domestic suppliers and as impairing the benefit under Article I because it adversely affects the competitive conditions between the suppliers against whom the duty is applied and suppliers in other countries.

Safeguard Measures — A tariff surcharge applied consistently with the GATT might be regarded as impairing the benefit of a tariff binding because it adversely alters the conditions of competition between foreign suppliers and domestic suppliers.

4.5. *Domestic Standards.*

Technical Standards as Import Barriers — A technical standard conforming to Article XX and the TBT Agreement (that is not an unnecessary obstacle to trade because it is not more restrictive than necessary to protect a particular permissible objective and is in conformity with an international standard ⁽⁷¹⁾) might be regarded as impairing the benefit of a tariff binding because it affects the competitive conditions established by it.

Sanitary or Phytosanitary Standards — Similarly, a sanitary or phytosanitary standard might adversely affect the competitive conditions established by a tariff binding even though the standard is not a violation of the SPS Agreement because the standard conforms to an international standard ⁽⁷²⁾; or is higher than the relevant international standard but justified on scientific grounds ⁽⁷³⁾.

Labour Standards — An importing country's low labour standards might be regarded as impairing the benefit of that country's tariff bindings because the consequent low labour costs affect the relative competitiveness of domestic and foreign suppliers.

Labelling Requirements — A regulation applying to both domestic and imported products requiring the disclosure of information on packaging might be regarded as impairing a benefit under a

(71) See Agreement on Technical Barriers to Trade, Article 2.

(72) In conformity with Article 3(2) of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement').

(73) In conformity with Article 3(3) of the SPS Agreement.

binding if the cost of compliance has more impact on per unit cost of product for importers than for domestic producers.

4.6. *Omissions from Law or Failures to Enforce Law.*

A literal interpretation of the non-violation provisions might embrace situations in which the concern is with the absence of a law or the failure to enforce a law.

Absence of Environmental Regulation or Labour Standards Regulation — The absence of environmental or labour standards regulation may be regarded as impairing the benefit of a binding because the failure to impose what would otherwise be a part of the cost of production for domestic producers, improves the competitive position of domestic producers in relation to foreign suppliers. The absence of regulation can be viewed as giving an advantage which is similar to that given by a non-specific subsidy and is sometimes viewed as a regulatory subsidy.

Absence of Competition Law — The absence of competition law in one country may adversely affect the market access that may be gained by another country's exporters.

Absence of Anti-Monopoly Law or Law Restraining Abuse of Monopoly Power — Permitting a domestic supplier to attain or to abuse a monopoly position may impair the benefits accruing under a tariff concession to foreign suppliers. Under the GATS, such a deficiency in the law would be a violation rather than a non-violation complaint ⁽⁷⁴⁾. *Absence of Regulation of Tied Distributorships* — The absence of any law preventing manufacturers from refusing to supply distributors unless they agree not to purchase from other suppliers may make it difficult for a foreign supplier to distribute their produce through existing wholesalers thereby impairing the benefit of a tariff binding.

Absence of Intellectual Property Protection — In the absence of laws protecting intellectual property, sales of a product into a market may be less than they would otherwise be for the reason that imitators can sell copies of the product for a lower price. Therefore,

(74) See GATS Article 8(1).

the absence of intellectual property protection may impair the benefit that would otherwise flow from a tariff binding ⁽⁷⁵⁾.

4.7. *Nullification or impairment of benefits under TRIPS.*

It can be argued that TRIPS does not provide any benefits other than those which are set out in its provisions and which define the scope of violations of the Agreement. On that basis, there is no scope for non-violation complaints because if there is no violation then there is no relevant benefit to be impaired. An alternate view is that the benefit of such intellectual property protection as the TRIPS requires can be impaired by non-violation measures. Such a view would require a notion of benefit that goes beyond the specific protection required by the particular provisions of the TRIPS. Some foreseeable arguments might include the following.

Provisions on Exhaustion — It appears that a failure to prohibit the import of a work produced with the authorization of the copyright holder in another Member's territory would not be a violation of the TRIPS ⁽⁷⁶⁾ but it might be argued that such a failure would impair the benefit of copyright protection required under the TRIPS.

Provisions on Licensing or Government Use of Patented Subject Matter — It might be possible to argue that the use by a government of the subject of a patent or a law requiring licensing of the subject of a patent impairs the benefit of the protection given to the industrial property even though the governmental use or licensing does comply with article 31 of TRIPS.

4.8. *Observations on the Literal Interpretation.*

Literal interpretation of nullification or impairment results in a

(75) The United States has used this argument to justify use of 'Special 301'. One of the triggers in Section 301 including those triggered by the 'Special 301' provision is that another country's inadequate intellectual property law "denies benefits to the United States under, any trade agreement". See 'Special 301' at 182 of the Trade Act of 1974 codified at 19 USC § 2242. This trigger for s301 is in 19 USC § 2411(a)(1)(B)(ii).

(76) See TRIPS Article 6.

broad scope for non-violation complaints. A broad interpretation of "benefit" might mean that nullification or impairment of benefits might relate to any detrimental effects on market access. Nullification or impairment of benefits might occur in relation to measures which are not specific to particular products or services or which do not relate directly to products or services at all but relate to economic entities generally. Nullification or impairment could relate to measures of one party affecting benefits of another party from a concession of a third party. Nullification or impairment of benefits might occur even in situations in which measures conform to the specific provisions of exceptions or specific agreements. Under the GATT, nullification or impairment could relate both to benefits under negotiated commitments and also to other benefits. Whatever the scope of a literal interpretation of the provisions on non-violation complaints, we need to consider whether a literal interpretation is appropriate. Therefore, one of the objects of the following analysis of the context and objects and purposes is to decide whether a literal interpretation is tenable.

5. *Interpretation of the text in the context of all of the provisions of the agreement.*

It is important that the words of the non-violation provisions be interpreted in the context of the whole framework of rules established by the relevant treaty, for the WTO treaties create a set of interrelated rights and obligations and each provision has a particular role in creating that set of interrelated rights and obligations. This analysis concentrates on the GATT and the GATS. The TRIPS is considered separately and to a limited extent. A number of aspects deserve examination:

5.1. *The Importance of the Balance of Concessions to Dispute Settlement.*

A number of the provisions of the GATT and the GATS indicate that a concept of balance of concessions is important. Two strong

indicators of the importance of the balance of concessions are the presence of: (a) provisions prohibiting conduct that would undermine or circumvent tariff concessions or scheduled commitments; and (b) provisions that permit readjustments of concessions or commitments.

5.1.1. *Provisions Prohibiting Conduct that would Undermine or Circumvent Tariff Concessions of Scheduled Commitments.*

Tariff Concessions under the GATT.

A number of provisions protect the value and integrity of tariff concessions. These prohibit certain conduct or measures which would nullify or impair a tariff concession:

- (i) by increasing other charges in connection with importation (Article II:1(b));
- (ii) by changing the method of determining dutiable value or of converting currencies (Article II:3);
- (iii) by state import monopolies charging mark ups in excess of bound tariff rates (Article II:4);
- (iv) by applying discriminatory sales taxes (Article III:2);
- (v) by applying discriminatory internal regulations (Articles III:4 and III:5);
- (vi) by applying domestic sourcing requirements (Article III:5); or
- (vii) by the imposition of an import prohibition or quota (Article XI).

Specific Commitments under the GATS.

A number of provisions of the GATS protect the value of specific commitments. These prohibit certain conduct or measures which would nullify or impair a specific commitment: (i) by applying non scheduled quantitative restrictions (Article XVI:2);

- (ii) by applying non scheduled derogations from national treatment (Article XVII);
- (iii) by unreasonable and biased administration of national laws (Article VI);
- (iv) by failing to ensure that a monopoly supplier does not

abuse its power or otherwise act inconsistently with specific commitments (Article VIII); or

(v) by restricting international payments for current transactions (Article V).

Competitive Relationship Between Imports and Domestic Supply.

A tariff concession or specific commitment reduces or removes a competitive disadvantage in terms of price which would otherwise apply to foreign goods or services in relation to their domestic competition. Each of the above listed prohibited measures would reverse, to some extent, the improvement in the competitive position of the imported goods or services established by the concession or commitment.

Effects on Producer Prices and Consumer Prices.

Tariff concessions reduce both the price received by domestic producers and the price paid by domestic consumers. All of the above listed measures which are prohibited by the GATT increase the price received by domestic producers. In addition, all of these measures increase the price that consumers must pay for the product: the domestic sourcing rules do so by raising the price of domestic product and, thereby, the average price of domestic and imported product, and all of the other measures do so by increasing the price of imports which flows on to domestic prices⁽⁷⁷⁾. Therefore, each of the prohibited measures undermine the effects of tariff concessions on both the price received by domestic producers and the price paid by domestic consumers⁽⁷⁸⁾.

Although it depends on the content of the specific commitment, it would also be generally true to say that specific commitments under the GATS also have the effect of reducing the price received

(77) For relevant economic analysis, see Neil VOUSDEN, *The economics of trade protection* (Cambridge University Press, Cambridge, 1990) on tariffs, at 25ff, on quantitative restrictions, at 38ff, on local content schemes at 40ff.

(78) These effects could also be described in terms of 'production effects' and 'consumption effects' being the changes in economic behaviour caused respectively by changes in producer price and changes in consumer price.

by domestic suppliers and the price paid by domestic consumers. Generally, the measures prohibited under the GATS also have both the effect of increasing the price received by domestic suppliers and increasing the price paid by domestic consumers and, therefore, undermining the effects of specific commitments on both the price received by domestic suppliers and the price paid by domestic consumers. The one exception would be unscheduled derogations from national treatment in the form of subsidies which have an effect on producer prices but not consumer prices. This exception arises out of a different approach taken in the GATT and the GATS to regulation of domestic subsidies: under GATT they are permitted but negotiable, whereas under GATS, they are permitted unless a sector is scheduled and, if the sector is scheduled, are negotiable and permitted only if scheduled ⁽⁷⁹⁾. The existence of this exception should not detract from the drawing of the general inference that prohibitions in the agreement are directed to measures which undermine negotiated commitments by undermining both the effects on prices to suppliers and on prices to consumers.

5.1.2. *Provisions Permitting Renegotiation of Concessions or Commitments.*

Article XXVIII of the GATT.

This article allows for the renegotiation of tariff concessions. A party wishing to withdraw or modify a tariff concession is required to negotiate a new tariff concession on some other product in substitution for the tariff concession that it wishes to withdraw. If agreement cannot be reached on the substitute tariff concession, then the initiating party can still proceed to withdraw the concession but other parties are permitted to withdraw substantially equivalent concessions that they negotiated with the initiating party. The importance of the balance of concessions is stressed by the requirement that these renegotiations must be carried out so as to "maintain a general level of reciprocal and mutually advantageous concessions" ⁽⁸⁰⁾.

(79) See GATT Article 8:6(b) & GATS Articles XV & XVII.

(80) GATT Article XXVIII:2.

Article XXI of the GATS.

There is a similar provision in the GATS. A party wishing to withdraw or modify a scheduled commitment must negotiate substitute commitments as compensation. If agreement is not reached on the compensation, affected parties can request arbitration and if the initiating party proceeds to withdraw or modify the commitment without implementing compensation in accordance with the arbitration, then the affected parties may modify or withdraw substantially equivalent benefits. The maintenance of the balance of negotiated commitments is emphasized by the requirement that in negotiations over compensation, the Members concerned shall endeavour to maintain the pre-existing "general level of mutually advantageous commitments" (81).

The Significance of the Renegotiation Provisions.

The presence of these renegotiation provisions in the GATT and the GATS is indicative of the nature of the treaties and of their dispute settlement system. First, in one sense, there is very little difference between the treatment of a violation and a non-violation. The way that the renegotiation provisions treat a unilaterally initiated variation of a party's own obligations is similar to the way that the dispute settlement provisions treat a violation of a party's obligations. Both involve compensation and the possibility of countermeasures. Secondly, since a defendant to dispute settlement proceedings relating to a negotiated concession or commitment can resort to the renegotiation procedures so as to erase the obligation which is the subject of the dispute, then at least in disputes concerning negotiated concessions or commitments, the function of the dispute settlement system can only be to maintain the negotiated balance of concessions rather than to achieve compliance with a particular concession or commitment.

(81) GATS, Article XXI:2(a).

5.2. *Consideration of Whether any Restriction of the Application of Article XXIII is Implied by the way that other Provisions of the Agreement Provide for Escape Clauses to Respond to Specific Circumstances.*

An extremely important feature of the framework of rules in both GATT and GATS is that the formal dispute settlement provision is only one of a number of provisions through which obligations may be withdrawn or suspended ⁽⁸²⁾. To determine the function of the dispute settlement provisions and the role of non-violation complaints, it is necessary to view the dispute settlement provisions in the context of the other provisions permitting the withdrawal or suspension of obligations or the rebalancing of obligations. Of course, there is also the option of withdrawing completely from the Agreement ⁽⁸³⁾. To do so, it is not necessary to establish any kind of violation. Then there are the renegotiation provisions of Article XXVIII of the GATT and Article XXI of the GATS which have already been mentioned. As a baseline for comparison with other escape provisions, we can note that, under these renegotiation provisions, modification of a concession or commitment does require the giving of compensation and may expose the modifying party to retaliation.

Other Escape clauses under the GATT.

Articles XII or XVIII Section B - Balance of Payment Restrictions — Parties in balance of exchange difficulties meeting certain criteria relating to the level of their monetary reserves can impose restrictions. Such restrictions cannot be targetted against a particu-

(82) JACKSON, *World Trade and the Law of GATT* (Bobbs-Merrill, Indianapolis, 1969) p. 165. Jackson cites GATT Articles II:5, XII:4, XVIII:7, XVIII:21, XIX:3, XXIII, XXVIII:3, & XXVIII:4. See also the discussion of various provisions of the GATT pursuant to which retaliation is permitted in: HUDEC, ROBERT E., *Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment* (1975) 59 *Minnesota Law Review* 461-539 at pp. 507-510; and in RHODES, Carolyn, *Reciprocity, US Trade Policy and the GATT Regime* (Cornell University Press, Ithaca & London, 1993) ch4 "GATT Norms, Retaliation and Dispute Settlement" pp. 79-113 at 94-101.

(83) WTO Agreement, Article XV.

lar country's exports. For measures conforming to these exceptions, it is not necessary to give any compensation, nor is the party exposed to any risk of retaliation.

Article XIX and the Agreement on Safeguards — Emergency Safeguards — Parties whose domestic industries are suffering serious injury as a result of increases of imports caused by unforeseen consequences of tariff concessions can impose restrictions. Such restrictions cannot be targetted against a particular country's exports (subject to one exception) ⁽⁸⁴⁾. For measures conforming to the safeguards exception, it is necessary to attempt to negotiate compensation ⁽⁸⁵⁾. Generally, there is no exposure to the risk of retaliation for the first three years ⁽⁸⁶⁾.

Article XVIII - Economic Development — To assist in establishing an infant industry, a developing country Member may impose restrictions. Such restrictions cannot be targetted against a particular country's exports.

Article VI and the Agreement on Anti-Dumping Duties — Parties whose domestic industries are suffering material injury as a result of imports being sold at below normal price can charge an anti-dumping duty. Such duties can be targetted directly against a particular exporter in a particular country.

Article VI and the Agreement on Subsidies and Countervailing Duties — Parties whose domestic industries suffer material injury as a result of imports that are subsidized by an actionable' subsidy can charge a countervailing duty. Such duties can be targetted directly against a particular country.

Article XX - General Exceptions — Parties may impose restrictions if they comply with one of the reasons listed in Article XX. These include protection of health, the conservation of exhaustible natural resources and securing compliance with laws relating to patents, trade marks and copyright. Generally, such restrictions cannot be targetted against a particular country. The applicable test is that the restrictions cannot be "a means of arbitrary or unjustifi-

(84) Agreement on Safeguards, Article 5. The exception is in Article 5:2(b).

(85) Agreement on Safeguards, Article 8:1.

(86) Agreement on Safeguards, Article 8:3.

able discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”.

Article XXI - Security Exception — Parties may impose restrictions for reasons of national security. Whether such restrictions can be targetted against particular countries depends upon whether Article XXI is subject to Articles I and XIII. It seems that measures under this Article can be discriminatory provided that the discrimination is justified by reasons of national security.

Other Escape Clauses under the GATS.

Article XII - Balance of Payments — Members suffering serious balance of payments problems may impose restrictions on trade in services on which specific commitments have been made. Such restrictions cannot be targetted against particular countries.

Article XIV - General Exceptions — Members can impose restrictions if they comply with one of the exceptions listed in Article XIV. These include restrictions necessary for protection of health or for securing compliance with laws relating to safety or confidentiality of information. These also include laws relating to income tax which derogate from national treatment if the derogation is aimed at achieving equitable or effective imposition or collection of tax or which derogate from most favoured nation treatment but do so in conformity with an international double tax agreement. None of such restrictions may be a “means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services”.

Article XIV bis - Security Exceptions — Members can impose restrictions for reasons of national security. Whether such restrictions can or cannot be targetted against particular countries depends upon whether Article XIV bis is to be read as subject to Article II.

The dispute settlement provisions in the context of the other provisions for withdrawal or suspension of obligations.

Under the dispute settlement provisions, the WTO can authorize the release of obligations on a discriminatory basis against the party whose measure is a violation or is causing nullification or

impairment. This aspect of the suspension of obligations under the dispute settlement provisions is exceptional, for while there are a number of other ways to be released from obligations, most of them require non-discriminatory treatment. This can be taken to infer that for those situations for which an escape clause is provided on a non-discriminatory basis, withdrawal or suspension of obligations is intended not to occur on a discriminatory basis. This would mean recourse to the dispute settlement provisions of GATT or GATS should not be available, in non-violation situations for which an escape is provided on a non-discriminatory basis because permitting recourse in such situations might allow escape from obligations on a discriminatory basis in circumstances in which a more specific provision of the agreement has restricted such escape from obligations to a non-discriminatory basis.

A similar argument can be made in respect of compensation. Under Article XXIII, authorization to escape from obligations does not require the giving of compensation. On this basis, one would interpret the dispute settlement provisions as not being intended to authorize suspension of obligations in non-violation situations in which recourse could be made to some other provision of the agreement which would only permit suspension of obligations with the giving of compensation.

Suspending Obligations in response to Non-Violation Subsidies.

One can also consider whether the right to suspend tariff concessions in response to subsidies implies any restriction of the scope of Article XXIII. Consider, the case of a non-violation subsidy allegedly nullifying or impairing the benefit of import access accruing under a tariff binding given by the government of the subsidizing party. Under the provisions of the Agreement on Subsidies and Countervailing Duties, countermeasures could not be authorized nor could countervailing measures be instituted against such a subsidy unless the subsidy was actionable⁽⁸⁷⁾. Therefore, the SCM Agreement manifests the intention that a nullification or impairment

(87) Note the exception in Article 9 of the SCM Agreement.

of a tariff binding caused by a non-actionable subsidy should not give rise to a right for other parties to be released from obligations. The authorization of retaliation under Article XXIII:1(b) against the maintenance of a non-actionable non-violation subsidy would be inconsistent with the SCM Agreement. In the case of inconsistency, the SCM Agreement should prevail since it is the more specific provision. Therefore, Article XXIII:1(b) should be interpreted so that it does extend to nullification or impairment of a tariff binding by a non-violation subsidy which is non-actionable under the SCM Agreement.

Consider also the case of a non-violation subsidy allegedly nullifying or impairing the benefits of export access to a third country under the third country's tariff binding. Leaving aside the question of whether the concept of nullification or impairment under either Article XXIII of GATT or under the SCM Agreement includes benefits in third country markets, it would also be true that for this type of nullification or impairment no countermeasures could be taken under the SCM Agreement unless the subsidy was actionable. Applying the same rules for resolution of inconsistency, it can be concluded that if Article XXIII:1(b) can apply at all in respect of third country effects of non-violation subsidies, it cannot apply to non-violation subsidies which are non-actionable under the SCM Agreement.

Under the GATS, the position is simpler, a subsidy affecting a scheduled service is a violation of Article XVII unless the derogation from national treatment is scheduled. Article XXIII:3 could only apply to a subsidy in respect of which the derogation from national treatment was listed but where the subsidy has effects the absence of which could be regarded as a benefit reasonably expected to accrue as required under Article XXIII:3.

Suspension of Obligations in Response to Regulatory Subsidies.

It is useful to continue this analysis to consider the question of regulatory subsidies ⁽⁸⁸⁾. It can be argued that a low standard of

(88) Generally on regulatory subsidies, see Joel P. TRACHTMAN, *International*

regulation has the same effects of nullification or impairment as a financial subsidy. It is clear that the SCM Agreement only applies to subsidies which involve a financial contribution by a government or public body ⁽⁸⁹⁾. Therefore, while the SCM Agreement does create an escape clause for retaliation against specific financial subsidies, it does not create an escape clause in respect of subsidies which though specific are not financial. Equally, the SCM Agreement excludes retaliation against non-specific (and other non-actionable) financial subsidies but does not exclude retaliation against non-specific (and other non-actionable) non-financial subsidies. The question arises as to whether the exclusion of non-financial subsidies under the SCM Agreement implies that Article XXIII should be interpreted so as not to apply to non-financial subsidies. One argument would be that the SCM Agreement was intended to clarify that non-violation nullification or impairment could apply to financial non-violation subsidies and that the exclusion of non-financial subsidies indicates an intention that non-violation nullification or impairment should not apply to non-financial subsidies. In case of rejection of this first argument, another possible argument would be that the exclusion from the SCM Agreement of rights of retaliation against non-financial subsidies and against non-specific non-violation financial subsidies implies that rights of retaliation against non-specific non-violation non-financial subsidies should be no more extensive than rights of retaliation against non-specific non-violation financial subsidies. From that and the fact that no right of retaliation is provided against financial non-specific non-violation subsidies, it would follow that no right of retaliation should exist against non-financial non-specific non-violation subsidies. That would mean that Article XXIII:1(b), even if capable of having application to a specific regulatory subsidy, could not apply to a non-specific regulatory subsidy.

Regulatory Competition, Externalization, and Jurisdiction (1993) 34(1) *Harvard International Law Journal* 47-104.

(89) SCM Agreement, Article 1.1.

5.3. *Consideration of Whether Any Restriction of the Application of Article XXIII is Implied by the Way that Other Provisions of the Agreement Provide How Parties can Respond to Restrictions Imposed by Other Parties.*

5.3.1. *Response to Restrictions Imposed Under the GATT.*

Retaliation against Balance of Payments Restrictions.

Under Article XII or Section B of XVIII ⁽⁹⁰⁾, the WTO may authorize members to suspend obligations toward a member maintaining balance of payments restrictions in certain circumstances ⁽⁹¹⁾. A question arises as to whether these provisions should operate in conjunction with Article XXIII or to the exclusion of it. These provisions permit the authorization of retaliation in the case of only some and not all violations. It is necessary not only that there be a violation but that the violation must be of a serious nature and must cause or threaten damage. It follows that there are some types of violations of the balance of payments provisions which are not intended to have the consequence that retaliation may be authorized in response. An inconsistency would arise if retaliation were authorized pursuant to Article XXIII in circumstances in which it could not be authorized under the more specific provisions. If the inconsistency is resolved by giving precedence to the more specific provisions, then retaliation cannot be authorized under Article XXIII against violations of the balance of payments provisions which could not justify retaliation under those provisions. It follows, a fortiori, that retaliation cannot be authorized under Article XXIII in response to a non-violation balance of payments restriction.

Retaliation Against Safeguards Measures.

Article XIX and the Safeguards Agreement permit Members to impose retaliation against safeguards measures in cases where the

(90) Interpreted in accordance with the Understanding on the Balance-Of-Payments Provisions of the GATT 1994.

(91) GATT Articles XII:4(c)(ii) and XVIII:12(c)(ii).

Members have been unable to reach agreement on adequate compensation for the safeguard measure ⁽⁹²⁾. In the case of safeguards measures which are taken in response to an absolute increase in imports (rather than merely a relative increase as a proportion of a decreasing quantity of total sales) and which conform to the Safeguards Agreement, the right of suspension cannot be exercised for the first three years of the safeguard measure being in effect ⁽⁹³⁾. Article XXIII is expressly incorporated into the Safeguards Agreement ⁽⁹⁴⁾ so it is necessary to examine whether there is any inconsistency between the provision for authorization of suspension of obligations in Article XXIII and the more specific provisions for suspension of obligations under the Safeguards Agreement and Article XIX. The area of inconsistency between the application of Article XXIII and the application of the Safeguards Agreement and Article XIX arises in the case of retaliation against safeguards which are non-violations and which are in response to an absolute increase in imports. Under a literal interpretation of Article XXIII, such a measure could constitute a non-violation nullification or impairment of a benefit, and retaliation could be authorized. However, Article 8(3) of the Safeguards Agreement provides that in that situation, retaliation cannot be implemented during the first three years of the safeguard measure. Resolution of this conflict is governed by the general interpretative note to Annex 1A which rules that the more specific agreement should prevail to the extent of the conflict. Therefore, retaliation could not be authorized under Article XXIII against a (non-violation) safeguard measure falling within Article 8(3) for the first three years. This means that in almost all circumstances retaliation could not be taken in response to a non-violation safeguard measure. It is reasonable to argue that any nullification or impairment of a benefit resulting from measures conforming to the specific safeguards rules is not included within the meaning of the words of Article XXIII:1(b) or (c).

(92) GATT, Article XIX:3(a) & Agreement on Safeguards, Article 8(2).

(93) Agreement on Safeguards, Article 8(3).

(94) Agreement on Safeguards, Article 14.

Retaliation Against Dumping.

Article II:2(b), Article VI and the Anti-Dumping Agreement (ADA') permit Members to impose retaliation in the form of anti-dumping duties against sales below normal price which are causing material damage to domestic producers. A question arises as to whether an anti-dumping duty in conformity with Article VI and the ADA could be the subject of a non-violation complaint. As set out above, the ADA adopts the nullification or impairment criteria but does not contain any language which confirms that non-violation complaints might be permissible. As also set out above, the provisions severely restrict the circumstances in which an anti-dumping duty might be found to be a violation. An anti-dumping duty cannot be a violation unless it is imposed as a result of a finding of fact which is biased or not objective or as a result of a finding of law which is not consistent with any permissible interpretation of the ADA (95). This effectively restricts the situations in which a country imposing an anti-dumping duty could be faced with having to remove the anti-dumping duty, pay compensation or suffer retaliation. It would seem absurd if an anti-dumping duty which by virtue of the specific provisions is not a violation anti-dumping duty could still as a non-violation measure be subject to compensation or retaliation. Therefore, a measure conforming to Article VI and to the ADA would be outside the scope of Article XXIII:1(b) or (c).

Measures under Article XX.

Unlike Articles XII or XIX, Article XX does not contain any specific provisions defining circumstances in which retaliation might be taken in response to a measure imposed pursuant to Article XX. The ordinary rules of Article XXIII:1(a) would apply to any measure purportedly taken under Article XX but not actually justified by it. The question arises whether Article XXIII:1(b) could apply to a measure which is in conformity with Article XX. The question must be considered in the context of the general importance in the

(95) See Agreement on Implementation of Article VI of the GATT 1994, Article 17:6.

agreement of maintaining the balance of concessions and becomes a question of whether resort to measures justified under Article XX is intended to be permissible without having to give compensation or risking retaliation. It is clear that the provision not only authorizes an increase in protection but authorizes the imposition of complete prohibitions. This is contrary to the overall scheme of regulation under the Agreement which attempts to have protection in a measurable and negotiable form. This may indicate that in the circumstances listed in Article XX, the provision is not concerned with the level of protection which may indicate that maintenance of a balance of concessions is not necessary in the case of measures under Article XX. It could be argued on that basis that measures conforming to Article XX should not be within the scope of Article XXIII:1(b). The same argument could be applied to measures in conformity with the TBT Agreement or the SPS Agreement.

5.3.2. *Response to Restrictions Imposed under the GATS.*

Balance of Payment Measures.

Unlike Article XII of the GATT, Article XII of the GATS does not contain separate provisions relating to retaliation against balance of payments restrictions. Retaliation against such restrictions can occur under Article XXIII. Article XII has the effect that measures initially in conformity with Article XII cannot be regarded as violations of Article XII until the IMF finds that the country has adequate monetary reserves ⁽⁹⁶⁾. If a Member's restrictions were within the limits set by the IMF and thereby safe from retaliation under Article XXIII:2, it would seem incongruous if retaliation could still be authorized under Article XXIII:3.

Measures Under Article XIV.

Similar arguments can be made in respect of the application of non-violation complaints to measures under this Article as were made in relation to Article XX of the GATT. Some additional

(96) GATS, Article XII:2(d) & (e) & XII:5(e).

guidance might be gained from analysis of Articles XIV(d). Under Article XIV(d), an tax measure derogating from national treatment is not to be regarded as a violation of Article XVII even if the derogation is not scheduled provided that the measure is aimed at ensuring “the equitable or effective imposition or collection” of tax. It would seem odd if that provision only ensured that a deviation from national treatment in a tax measure adopted to ensure equitable imposition of tax did not have to be removed but could still lead to an obligation to give compensation or incur retaliation. It is submitted that measures in conformity with Article XIV(d) cannot be the subject of non-violation claims and that the whole of Article XIV should be interpreted in the same way.

Licensing and Qualification Requirements Under Article VI:5.

It is possible that a licensing or qualification requirement might comply with paragraphs 1 to 4 of Articles VI but still impair a benefit that could have been reasonably expected under a specific commitment. Article VI:5 introduces a more specific rule which it is submitted must apply to the exclusion of Article XXIII:3 (97).

5.4. Whether the above Considerations Indicate Upon Whom Lies the Onus to include References to Specific Matters in Schedules of Concession.

It was observed above that there were three ways that the problem of benefits of tariff bindings being nullified or impaired could be addressed and that each of the three ways are present in the GATT and the GATS to some extent. First, some behaviour that could nullify or impair tariff bindings is prohibited. Second, negotiated concessions or commitments can be made subject to qualifications and conditions. Third, each has a catch-all clause. The above analysis of the context within which the catch-all provisions operate indicates that a simple literal interpretation of the non-violation

(97) See Roessler, (1997) p. 135 (see above fn13) (saying that Article VI:5 reduces the need to resort to Article XXIII:3 but not actually saying that Article XXIII:3 could not apply).

nullification or impairment provisions is completely untenable. It is true that the existence of the catch-all clause means that we cannot presume that the introduction of a particular measure cannot justify suspension of a tariff concession merely from the fact that the tariff concession is not made conditional on the absence of the particular measure. However, if we give the non-violation or catch-all provision an interpretation that is narrower than the literal interpretation, then we are implicitly accepting that introduction of some types of measures cannot justify suspension of tariff concessions unless the tariff concession has been made subject to a condition that those types of measures will not be introduced. On that basis, the task of delineating the proper scope of non-violation complaints becomes one of dividing between those types of measures for which the onus is or is not on the party giving the tariff concession to explicitly make the measure a condition of tariff concessions.

The above analysis indicates that certain circumstances could not justify a non-violation claim and that an entitlement to retaliate (without compensation and on a discriminatory basis) would only flow from these circumstances if the tariff concessions or specific commitments had been made subject to the absence of these circumstances. Such circumstances would include (i) any circumstances for which a specific provision has been made in the GATT or the GATS for suspension of obligations on the basis either that the suspension would be non-discriminatory or that it would be accompanied by compensation; (ii) subsidies in response to which suspension of obligations cannot be authorized under the SCM Agreement or the Agriculture Agreement; and (iii) measures conforming to most (if not all) of the escape clauses of the Agreements. In these circumstances, a party wishing to suspend concessions cannot do so unless the right to suspend has been incorporated into the schedules.

6. *Subsequent agreement between the parties as to interpretation and subsequent practice establishing agreement as to interpretation of the non violation provisions.*

Subsequent agreements between the parties to a treaty as to its interpretation can be binding on them and subsequent practice of

parties to a treaty can be regarded as evidence of agreement as to an interpretation. Both of these factors are to be taken into account in interpreting the words of a treaty. Whilst there is room for contention as to how unanimous agreement among the parties must be or how uniform or widespread a practice must be ⁽⁹⁸⁾, given that the GATT always made decisions by way of consensus, it would be appropriate to take a conservative approach to allowing non-unanimous agreements or inconsistent or incompletely widespread practice to be taken as evidence of binding interpretations.

6.1. *Chile v Australia - Australian Subsidy on Ammonium Sulphate - 1949.*

The Ammonium Sulphate case ⁽⁹⁹⁾ is one of the few instances where the CONTRACTING PARTIES adopted a ruling that a non-violation measure did result in nullification or impairment under Article XXIII:1(b) ⁽¹⁰⁰⁾. It was in this case that the criteria of reasonable expectations was first enunciated with respect to non-violation nullification or impairment. The case concerned unusual facts. It was argued that the removal of the consumer subsidy on one of two competitive products and the continuance of the subsidy on

(98) Generally on the role of state practice in the interpretation of treaties, see MCGINLEY, GERALD P., *Practice as a Guide to Treaty Interpretation* (1985) *The Fletcher Forum* 211-230.

(99) "The Australian Subsidy on Ammonium Sulphate" report adopted by the CONTRACTING PARTIES on 3 April 1950 (GATT/CP.4/39) GATT BISD Vol II, 188.

(100) The decision is summarised in HUDEC, ROBERT E., *Enforcing International Trade Law - the evolution of the modern GATT legal system* (Butterworth, Salem NH, 1993) Synopsis of Complaints, case no 8; The decision is discussed in: Hudec (1975, see above fn82) at 483-489, HUDEC, *The GATT Legal System and World Trade Diplomacy* (Butterworth, Salem NH, 2nd ed, 1990) at 79-80 & 159-166, HUDEC, *Regulation of Domestic Subsidies Under the MTN Subsidies Code* in WALLACE, LOFTUS & KRIKORIAN (eds), *Interface Three - Legal Treatment of Domestic Subsidies* (The International Law Institute, Washington DC, 1984) pp. 1-18 at 5-6; HALLSTROM, *The GATT Panels and the Formation of International Trade Law* (1994, see fn64 above) pp. 172-173, JACKSON (1969, see fn82 above) 173, JACKSON, JOHN H. & DAVEY, WILLIAM J., *Legal Problems of International Economic Relations - cases, material and text* (West Publishing, St Paul, Minn. 2nd ed, 1984) pp. 346-351 (reproduces the text of the working party report and of the Australian statement).

the other product impaired the tariff binding on the product which no longer received the subsidy.

During the war, the Australian government imposed maximum prices on many food products and, to keep the costs to food producers down, the government also imposed maximum prices on fertilizers. The government appointed a private company, Nitrogenous Fertilizers Pty Ltd to act as distributor of two fertilizers, ammonium sulphate and sodium nitrate. The government purchased both fertilizers from abroad and sold them to the company at cost. The ammonium sulphate was imported from various countries not including Chile and the sodium nitrate was imported from Chile. The company also purchased ammonium sulphate from local suppliers. The government imposed a uniform maximum price on the company's sales of both fertilizers but the government met the losses incurred by the company on the sale of both products. In 1947, Australia gave a binding of the tariff on sodium nitrate at the rate of zero. On ammonium sulphate, the tariff was 12.5% without a binding. From 1 July 1949, the government removed the maximum sale prices on both products. The government ceased to meet the losses on the sale of sodium nitrate and Nitrogenous Fertilizers Pty Ltd ceased to distribute sodium nitrate. With respect to ammonium nitrate, however, the government continued to purchase supplies from abroad and to sell them to the company at cost and the government continued to meet the losses on the sale of ammonium sulphate up to a maximum ⁽¹⁰¹⁾. The result was that Chilean exports of sodium nitrate to Australia had to compete with subsidized sales of ammonium sulphate sourced from either Australian suppliers or non-Chilean foreign suppliers.

The report of the working party concluded that the Australian government had not violated the Agreement ⁽¹⁰²⁾. They found that Article III:2 did not apply because there was no 'internal tax or other internal charge' on sodium nitrate ⁽¹⁰³⁾. They found that Articles I and III:4 did not apply because sodium nitrate and ammonium

(101) BISD Vol II, 188 at 189, para 4.

(102) BISD Vol II, 188 at 192, para 11.

(103) BISD Vol II, 188 at 191, para 7.

sulphate were not “like products” as required by each of those provisions ⁽¹⁰⁴⁾. Therefore, there was no violation. What the working party did not say was that everyone concerned was probably rather surprised that this alteration of the consumption subsidy was not somehow caught by the combined net of Articles I and III. The alteration of the consumption subsidy did adversely affect the conditions of competition between Chilean suppliers of sodium nitrate and other foreign suppliers of ammonium sulphate, arguably, according the Chilean suppliers something less than most favoured nation treatment. However, the MFN rule in Article I could only apply if sodium nitrate and ammonium sulphate could be regarded as “like products”. Perhaps more significantly, the consumption subsidy was a “law ... affecting internal sale” within the meaning of Article III:1 and it did tilt the conditions of competition between Chilean suppliers of sodium nitrate and Australian suppliers of ammonium sulphate “so as to afford protection to domestic producers” contrary to the national treatment principle stated in Article III:1. However, the way that the principle in Article III:1 is embodied in the effective rules of Article III:2 & 4 did not catch this measure. Article III:4 only prohibited the non-national treatment if sodium nitrate and ammonium sulphate could be regarded as “like products”. The second sentence of Article III:2 can apply to “directly competitive and substitutable product[s]” but Article III:2 only applies to taxes and not to subsidies. However, economists may not have seen much difference between reducing the rate of sales tax on one of two directly competitive and substitutable products and reducing the rate of sales subsidy on one of two such products. For them, both would be in breach of the spirit of the second sentence of Article III:2. They might have regarded the discriminatory reduction of the subsidy as a failure to carry out the obligation imposed by Article III:2 in good faith. On that basis, it might have been possible to treat the action as a violation of Article III:2.

Having found that there was no violation, the working party considered whether there was non-violation nullification or impair-

(104) BISD Vol II 188 at 191-192, paras 8 & 9.

ment. The majority of the working party said that nullification or impairment of a benefit accruing under the Agreement would exist:

“if the action of the Australian government which resulted in upsetting the competitive relationship between sodium nitrate and ammonium sulphate could not reasonably have been anticipated by the Chilean government, taking into consideration all pertinent circumstances and the provisions of the General Agreement, at the time it negotiated for the duty-free binding on sodium nitrate” (105).

The working party made a finding that, during the negotiation of the tariff binding in 1947, Chile could not reasonably have anticipated that the subsidy would be removed from sodium nitrate before it was removed from ammonium nitrate. The working party explained that this finding is based on the particular facts of the case. The working party said that the removal of a subsidy would normally be within the reasonable expectations of a party negotiating a tariff binding and further that in the case of the introduction of a subsidy on one of two competing products, it would be harder than in the present case, to establish that the action was outside the scope of reasonable expectations. The working party listed the peculiar facts of the present case which justified its finding that the change in the subsidy could not have been reasonably expected, placing emphasis on the fact that the subsidies, existing at the time the binding was negotiated, were a carry over from the same subsidy scheme introduced during wartime for two closely related fertilizers (106). The working party seems to have taken care to avoid establishing a precedent for other non-violation claims.

The way that the working party used the concept of reasonable expectations is not clear. The working party report refers only to the reasonable expectations of Chile. It does not refer to the reasonable expectation of both parties. If the concept of reasonable expectations is being used as a tool of treaty interpretation, then there are two possible constructions of what the working panel did. One construction is that the working party's reference to the reasonable expectations of Chile was meant as a reference to the common

(105) BISD Vol II 188 at 192-193, para 12.

(106) BISD Vol I 188 at 193, para 12.

expectations actually held by both Australia and Chile. Another construction is that the working party's reference to the reasonable expectations of Chile was meant as a reference to the objectively reasonable expectation of both parties and that the treaty should be interpreted so that the common intention of the parties is that any party can be released from their obligations on the basis of those objectively reasonable expectations as to the circumstances in which the treaty would be performed. Another construction is that the working party said that the treaty should be interpreted so that the common intention of the parties is deemed to be that any party can be released from their obligations on the basis of solely their own reasonable expectations as to the assumptions underlying the treaty. It is contrary to the notion of a treaty that it should be interpreted to give effect to the reasonable expectations of one party rather than to the reasonable expectations of all parties. The only other possibility is that the working party was applying a rule of law that did not derive from the treaty: a principle that reasonable expectations should be protected. However, the panel made no reference to any such principle and seems to have regarded its task as one of applying the treaty.

Australia issued a separate statement disassociating itself from the finding of the working party on nullification or impairment. Australia's statement took issue not only with the finding as to whether the continued equal treatment of the two products was reasonably expected but also with the use of reasonable expectations as a criteria for determining the presence of nullification or impairment. The statement says:

"The history and practice of tariff negotiations show clearly that if a country seeking a tariff concession on a product desires to assure itself of a certain treatment for that product in a field apart from rates of duty *and to an extent going further than is provided for in the various articles of the General Agreement*, the objective sought must be a matter for negotiation in addition to the actual negotiation respecting the rates of duty to be applied.

If this were not so, and if an expectation (no matter how reasonable) which has never been expressed, discussed or attached to a tariff agreement as a condition is interpreted in the light of the arguments adduced in the report of the working party, then tariff concessions and the binding of a rate of duty would be extremely

hazardous commitments and would only be entered into after an exhaustive survey of the whole field of substitute or competitive products and detailed analyses of probable future needs of a particular economy" (107).

The difference between the majority view and the Australian view is a clear illustration of the different approaches to maintaining the integrity of tariff bindings that were mentioned in the first part of this paper: the first approach, specific prohibitions in the Agreement, the second approach, negotiating specific conditions in tariff concessions and the third approach, the catch-all clause. Australian argued unsuccessfully that the second rather than the third approach should govern this situation while Chile was successful in bringing this behaviour within the scope of the third approach, the catch-all clause. Effectively, Australia and Chile each argued that in the tariff negotiation the onus was on the other to raise the possibility of the discontinuance of equal subsidization of ammonium sulphate and sodium nitrate: Australia arguing and Chile denying that if Chile wished its own obligations owed to Australia to be subject to Australia maintaining equal treatment of these two products, then it should have negotiated a condition to that effect in some or all of its own bindings; and Chile implicitly arguing and Australia denying that if Australia wanted to be free to change the equal subsidy treatment, it should have made the binding on sodium nitrate subject to a right to change the subsidy on sodium nitrate. The decision of the working party regarded the onus as having been on Australia rather than Chile to insert some undertaking or condition relating to the subsidy in the Schedules.

The Australian response is interesting. It says that the decision places an onus on a party negotiating a tariff binding on a product to survey the whole range of competitive products and to consider every policy that the needs of the economy might require in the future. The Australian concern was that some future policy relating to one product upon which a tariff binding has been given might

(107) "Statement By the Australian Representative", annex to the report of the panel on "Australian Subsidy on Ammonium Sulphate" GATT, BISD Vol II 181 at 195-196, para 3 (emphasis in original).

adversely affect the competitive position between that product and a competitive product and that, even though that future policy was not prohibited under any provision of the Agreement, if it was beyond the scope of reasonable expectations, it might justify other partners withdrawing their tariff concessions from Australia. However, the logical extension of Australia's argument would be that no non-violation measure could justify a withdrawal of concessions no matter how thoroughly or unreasonably it adversely affected the conditions of competition established by a tariff binding unless it infringed an express condition that was incorporated into the other party's tariff concessions. That would have meant that the integrity of tariff concessions could be protected only by the first approach, prohibitions in the Agreement, and by the second approach, express conditions attached to tariff concessions. However, the GATT does not limit itself to those two approaches. It also adopts the catch-all clause in Article XXIII:1(b) and upon the interpretation argued by the Australians the catch-all clause would have had no scope at all.

Several factors detract from the weight of the decision as an instance of "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of Article 31(3)(b) of the Vienna Convention. First, Australia made a clear objection to this decision being regarded as binding. Secondly, in any case, the decision can quite easily be limited to its facts. It would be consistent with the decision to interpret Article XXIII:1(b) as regarding parties as taking the risk of subsequent non-violation measures unless they had specifically included conditions in their tariff concessions except in the very narrow fact situation upon which the dispute arose. Therefore, it would be consistent with the decision that parties generally take the risk of consumption subsidies being introduced or removed and generally take the risk that other types of policies, not prohibited by the Agreement, including say domestic subsidies, can be introduced or removed. Finally, it might be more appropriate to regard this as a violation situation because, in substance, Australia had failed to carry out in good faith its obligations under Article III.

6.2. *Norway v Germany - Treatment by Germany of Imports of Sardines - 1952.*

In the 1952 dispute over German Treatment of Imports of Sardines, the panel again employed a "reasonable expectations" criteria to reach a finding of non-violation nullification or impairment ⁽¹⁰⁸⁾. This case and the Ammonium Sulphate case were, for the next 38 years, the only two instances in which the CONTRACTING PARTIES adopted a finding of non-violation nullification or impairment. Like the Ammonium Sulphate case, the dispute over German Treatment of Sardines arose out of extremely unusual facts. Germany imported three types of sardines. It imported 'sprats' and 'herring' from Norway and 'pilchards' from Portugal. Prior to 1923, Germany gave the same tariff treatment to all three types of sardines. In 1923, Germany negotiated a reduction in the rate applicable to pilchards with Portugal ⁽¹⁰⁹⁾. Pursuant to an exchange of notes between Germany and Norway in 1925, Germany undertook to Norway that it would provide the same customs treatment to sprats and herring as it gave to pilchards. When Germany acceded to GATT at the completion of the Torquay round of negotiations in 1951, Norway was a contracting party but Portugal was not. Germany gave a tariff binding of 25% on sprats and on herrings but left the rate on pilchards unbound at 30% ⁽¹¹⁰⁾. Between the negotiation of the bindings and their coming into force, Germany conducted bilateral negotiations with Portugal, in the course of which the German government reached the conclusion that it was still

(108) "Treatment By Germany of Imports of Sardines" report adopted by the CONTRACTING PARTIES on 31 October 1952 (G/26) GATT BISD 1S/53-59. The decision is summarized in Hudec (1993, see fn100 above) Synopsis of Complaints, case no 18 and is discussed in Hallstrom (1994, fn64 above) pp. 173-174, Hudec (1975, fn 82) pp. 491-493, Hudec (1990, see fn 100 above) pp. 174-178, Petersmann (1991, see fn6 above) pp. 204-205, & Petersmann, "Non-Violation Complaints" and "Situation Complaints in GATT/WTO Law: What is Their Legitimate Function?" ch4 in PETERSMANN, *The GATT/WTO dispute settlement system: international law, international organization and dispute settlement* (Kluwer, London, 1997) pp. 154-156.

(109) Hudec (1990, see fn100 above) p. 174.

(110) GATT BISD 1S/53, at 54-55, para 3. It also gave a binding of 20% on a particular type of herring.

bound by the tariff concession granted to Portugal on pilchards in 1923. Germany reduced the duty to the rate of specific duty which had applied pre-war, and soon after replaced it with an ad valorem duty of 14% ⁽¹¹¹⁾. Norway complained about the disadvantageous tariff treatment of sprat and herring on two grounds: first, that the less favourable treatment was a violation of Article I and, second, that it was in violation of a specific assurance given by the German delegation during the Torquay negotiations.

The violation claims depended on the three types of sardines being regarded as "like products". The panel, erroneously saw its task as the determination of whether Norway and Germany had regarded the products as like products in the course of their negotiations. The panel found that they had not and, therefore, concluded that "no sufficient evidence" had been presented to establish any of the alleged violations ⁽¹¹²⁾.

Next, the panel considered the alleged assurance given by the German delegation. The facts surrounding the alleged giving of the assurance were not clear. Hudec records much historical detail not recorded in the panel report ⁽¹¹³⁾. He indicates that the Norwegians were quite clear that the German delegation had given an assurance of equal treatment and they evidenced it by referring to a report tabled in the Norwegian parliament. On the other hand, the Germans indicated that they did not know exactly what had been said during the negotiation but they indicated that such an assurance had neither been authorized by nor reported to the either the head of the German delegation or the home government. The official alleged to have given the assurance could not be found ⁽¹¹⁴⁾. The panel did find that "both parties agreed that the question of the equality of treatment was discussed in the course of the Torquay negotiations" ⁽¹¹⁵⁾. However, the panel did find not make any finding of fact as to whether the German delegation has given any assurance. To resolve

(111) GATT BISD 1S/53 at 55, para 5. See also Hudec (1990, see fn101 above) 174-175.

(112) GATT BISD 1S/53 at 58, para 15.

(113) See Hudec (1990) pp. 174-176.

(114) Hudec (1990) pp. 176-177.

(115) GATT BISD 1S/53 at 59 para 16(b).

the case, the panel followed the formula used in the Ammonium Sulphate case. It said that the tariff bindings given to Norway would have been impaired

“if the action of the German Government, which resulted in upsetting the competitive relationship between [the different kinds of sardines] could not reasonably have been anticipated by the Norwegian Government at the time it negotiated [the tariff bindings]” (116).

The panel found that Norway had assumed that the equal treatment of the products would continue and had offered counter concessions on the basis of that assumption (117). Therefore, Germany’s action could not have been reasonably expected and was an impairment of the benefits accruing under tariff bindings.

The panel tried to limit the decision to its facts as the working party in the Ammonium Sulphate dispute had done. A clear difference between the two cases is that in the Ammonium Sulphate dispute, the decision could have been regarded as a construction of what the parties would have decided had they, in the course of the tariff negotiation, turned their attention to the matter, whereas in the Sardines decision the parties actually had turned their attention to the matter, had discussed it and had declined to record it as part of their agreement. In the circumstances, it was not reasonable to say that Norway was entitled to rely on a particular assumption if Norway’s delegation had discussed the issue and discovered that Germany’s view differed from its own. The rationale of the response of the Australian delegation to the report in the Ammonium Sulphate case would in this case be even stronger — How could Germany be bound by a negotiating partner’s assumption if they had discussed it and declined to confirm it?

The problem for the panel was that any decision on whether the assurance had been given was going to offend one of the parties. If it decided that the assurance had been given, it would have offended Germany by implying that either the head of delegation had acted

(116) GATT BISD 1S/53 at 58, para 16.

(117) Para 16(c).

without authority of the home government or that a member of the delegation had acted without authority of the head of delegation. If it decided that the assurance had not been given, it would have made the Norwegian delegation and the presenter of the subsequent report to Norwegian parliament look foolish for having relied on an assurance without ensuring that it was legally binding.

Therefore the panel made the decision not upon the basis of what the parties had agreed but upon the basis of what one party assumed. The panel either introduced a new principle of law protecting unilateral reasonable expectations or made a completely untenable treaty construction, that is, that Article XXIII:1(b) should be interpreted to deem the common intention of the GATT parties to be that any party can be released from their obligations on the basis of solely their own reasonable expectations as to the assumptions underlying the treaty *even regardless of the fact that they have raised the matter in negotiation and have failed to have their expectation confirmed*.

In retrospect, it seems clear that the panel took the view that Germany had made the assurance and should be bound by it. If it had been prepared to make that finding, it would not have needed to use the principle of non-violation nullification or impairment. This is simply an example of a hard case making bad law.

6.3. *Other Decisions - 1948-1982.*

Between the two early cases and two later decisions in the 1980s (Canned Fruits and Oilseeds), the CONTRACTING PARTIES adopted several decisions that impacted on non-violation complaints:

(i) in 1955, a Decision adopting a General Review working party report described a presumption in relation to domestic subsidies on the same product as the tariff concession ⁽¹¹⁸⁾:

“a contracting party which has negotiated a concession under Article II may be assumed, for the purpose of Article XXIII, to have a reasonable expectation, failing evidence to the contrary, that the

(118) “Reports relating to the review of the Agreement - Other Barriers to trade” report adopted on 3 March 1955 (L/334 and Addendum) GATT BISD 3S/222 at 224-225, paras 13 & 14.

value of a concession will not be nullified or impaired by the contracting party which granted the concession by the subsequent introduction or increase of a domestic subsidy on the product concerned" (119).

This presumption did not extend to competing products that were not like products nor to subsidies that were not subsidies on products. The presumption was never reinforced in such wide terms by any dispute panel.

(ii) another of the 1955 General Review Decisions, one on Article XVIII made the same kind of argument as I have made above in relation to balance of payment restrictions and safeguards: that the specific provision overrides the general so retaliation cannot be authorized under Article XXIII against a measure if retaliation could not be authorized under the more specific provision of Article XVIII (120);

(iii) decisions in 1956, 57, & 58 authorized retaliation against a violation the illegality of which had been waived (121);

(iv) a 1960 report on Restrictive Business Practices reflected views of all parties to a working party that Article XXIII should not be used to authorize retaliation against restrictive trade practices (122);

(v) a 1961 report of a panel on subsidies confirmed the statements of the earlier 1955 review on subsidies, referring to the presumption described in the earlier report by saying:

"the Panel understands that the presumption is that unless such pertinent facts were available at the time the tariff concession was negotiated, it was then reasonably to be expected that the

(119) "Reports relating to the review of the Agreement - Other Barriers to Trade" report adopted on 3 March 1955 (L/334 and Addendum) GATT BISD 3S/222 at 224, para 13.

(120) "Reports relating to the Review of the Agreement - Quantitative Restrictions" GATT BISD, 3S/170 at 188, para 63.

(121) See the US waiver decision at GATT, BISD 3S/32 and the subsequent authorizations of retaliation at BISD 5S/28, 6S/52, and 7S/124.

(122) "Restrictive Trade Practices - Arrangements for Consultations" report adopted on 2 June 1960 (L/1015) GATT BISD 9S/170-179 at 172, para 8 & at 177, para 18.

concession would not be nullified or impaired by the introduction or increase of a domestic subsidy" (123).

(v) a 1982 decision on Article XXI indicated that rights under Article XXIII could be exercised against measures maintained under Article XXI (124).

6.4. *EEC: production aids granted on canned fruit and dried grapes - 1982.*

In 1982, a dispute arose which related directly to the question of non-violation nullification or impairment of tariff bindings by domestic subsidies. The dispute related to production subsidies paid by the EEC on canned fruit and dried grapes (125). A panel found that bindings on canned peaches, canned pears and canned fruit cocktail were being impaired by the subsidies but bindings on dried grapes were not being impaired. The GATT Council was unable to reach a consensus to adopt the panel report. The EEC and the other parties were unable to reach agreement on two issues. At the GATT Council meeting in October 1985, the EEC offered to adopt the report if the meeting also adopted an understanding reflecting its position on the two issues in dispute (126). The other parties rejected the EEC's position and the report was not adopted. Even though the report was not adopted, both the report and the arguments made are still worthy of analysis to determine whether they indicate agreement among the parties as to the interpretation of Article XXIII:1(b). The

(123) "Subsidies - Operation of the Provisions of Article XVI", report adopted on 21 November 1961 (L/1442 & Add.1-2) GATT BISD 10S/201 at 209, para 28.

(124) "Decision Concerning Article XXI of the General Agreement" decision of 30 November 1982 (L/5426) GATT BISD 29S/23.

(125) "EEC - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes" report by the panel dated 20 February 1985 (L/5778). The dispute is summarized in Hudec (1993) Synopsis of Complaints, case no. 107. The case is also described in Hudec (1993) pp. 155-157 & Petersmann (1991, see fn6 above) 209-210 or Petersmann (1997, see fn108 above) 159-160.

(126) See C/M/192 and the text upon the basis of which the EC was prepared to accept the panel report, C/W/476.

fact that the EEC was prepared to vote for adoption of the report subject to an understanding on the two areas of contention does indicate agreement of the parties on other aspects of the panel report with which the EEC did not express disagreement. The way that the dispute was argued is also persuasive evidence of agreement among the parties as to the criteria for assessing nullification or impairment claims.

Consideration of the findings is easiest if the complaint is viewed as four separate complaints.

(i) The first relates to canned peaches. In the 1973 Article XXIV:6 negotiations over the accession of the UK, Ireland and Denmark to the EEC, the EEC had given a binding on canned peaches. On 1 July 1978, a subsidy on canned peaches was introduced. Pursuant to a Tokyo Round dated 30 June 1979, the EEC gave a lower binding.

(ii) The second relates to canned fruit mix. The EEC had also given bindings on canned fruit mix in both 1973 and 1979. The subsidy to producers of canned fruit mix was also introduced on 1 July 1978.

(iii) The third relates to canned pears. Bindings on canned pears had been granted in 1973 and 1979. On 24 July 1979, three weeks after the Tokyo Round bindings came into effect, the EEC introduced the subsidy to producers of canned pears.

(iv) The fourth sub-complaint related to dried grapes. In 1973, in the Article XXIV:6 negotiations, the EEC had given a binding on dried grapes of 4% and in 1979, it had given a binding of 3%. In 1981, Greece became the 10th member of the EEC. From 27 July 1981, the EEC introduced subsidy schemes in respect of dried grapes. The scheme was different from those relating to other fruits because it made special provision for storage, separating subsidies for storage from subsidies for other elements of production ⁽¹²⁷⁾. The subsidy scheme replaced a pre-existing scheme operated by Greece. In practice, the EEC subsidy was paid only to processors in Greece and not to processors in other parts of the EEC.

(127) L/5778, p. 3, para 11.

The panel said that there were two requirements in establishing a non-violation nullification or impairment claim, that:

(1) the measure “could not have reasonably been anticipated by the party bringing the complaint at the time of negotiation of the tariff concessions” ⁽¹²⁸⁾, and

(2) the measure resulted in the upsetting of the competitive position of the imported products concerned ⁽¹²⁹⁾.

With respect to the first element, the panel referred to the tariff bindings listed above. It also stated that it was not necessary for a party to establish an initial negotiating right in relation to a particular tariff concession in order to establish a right to a benefit accruing under the Agreement within the meaning of Article XXIII:1 ⁽¹³⁰⁾. The panel found that, at the time the EEC gave the various bindings on canned fruit, the United States could not have reasonably expected the subsequent introduction of the subsidies ⁽¹³¹⁾. Therefore, for both canned peaches and canned fruit mix, the subsidies introduced before the 1979 bindings could have been reasonably expected at the time those bindings had been given but could not have been reasonably expected at the time of the 1974 bindings. With respect to canned pears, the subsidy introduced after the 1979 binding on canned pears could not have been reasonably expected at the time of either the 1974 or the 1979 bindings. In relation to dried grapes, the panel found that at the time the EEC gave the bindings on dried grapes, the United States could reasonably have expected that “in the case of an accession of Greece to the EEC — the national Greek subsidy scheme would possibly be replaced by an equivalent EEC subsidy scheme for *Greek* processors” ⁽¹³²⁾ and, implicitly, that the United States could not reasonably have expected that the EEC would introduce a subsidy to Greek producers that went further than the previous Greek subsidy or that the EEC would introduce a subsidy to EEC producers outside of Greece.

(128) L/5778, p. 17, para 51.

(129) L/5778, p. 17, para 51.

(130) L/5778, p. 17, para 50.

(131) L/5778, p. 18, para 52.

(132) L/5778, p. 19, para 54 (emphasis in original).

In assessing whether the subsidies upset the competitive position established by the tariffs, the panel noted that while the regulation, pursuant to which the subsidies were paid, said that the purpose of the subsidies was to compensate for the higher cost of raw fruit in the EEC, the subsidy was not calculated by reference to the margin between the cost of raw product in the common market and its cost on the world market ⁽¹³³⁾. The purchase of raw product in the EEC was a condition of eligibility for the subsidy but the amount of the subsidy was calculated by reference to the margin between the EEC price and the duty free world price for the processed product, that is, the canned fruit or the dried grapes ⁽¹³⁴⁾. With respect to all of the products, the panel found: that the subsidy completely insulated EEC producers from changes in the world price of the processed product, that the subsidy went beyond compensating for the higher cost of buying unprocessed fruit in the EEC, and that "since the production aid [was] calculated as the difference between the computed EEC price and the duty-free price of imported product the bound rates of tariff duty had become an absolute margin of protection for EEC products" ⁽¹³⁵⁾. With respect to canned fruit, canned fruit mix and canned pears, the panel found that those effects amounted to an upsetting of the competitive conditions established by the tariff bindings described above. However, with respect to dried grapes, the panel found that those effects did not cause any market distortions that went beyond those imparted by the previous Greek subsidy scheme ⁽¹³⁶⁾. Therefore, the panel found that: the subsidies on canned peaches and canned fruit mix impaired the benefits under the 1973 bindings but did not impair the 1979 bindings on those products; the subsidies on canned pears impaired the benefits under both the 1973 and 1979 bindings on canned pears; but that the subsidies on dried grapes did not impair the benefits under either the 1973 or the 1979 bindings.

The EEC vetoed adoption of the panel for two reasons. First, it

(133) L/5778, p. 2, para 7.

(134) L/5778, p. 2, para 7 & 8.

(135) L/5778, p. 24, para 65.

(136) L/5778, p. 25, para 70.

argued that the panel should have required proof of trade effects in order to establish nullification or impairment by a subsidy. Secondly, although it agreed with the final conclusion in relation to the subsidy on dried grapes, it disagreed with that part of the panel's reasoning which indicated that it would be possible for a binding given by the EEC of nine to be impaired by the payment of a subsidy to producers in Greece, the tenth member of the EEC which was not a member at the time the binding was given.

Therefore, there are two quite separate decisions in the panel report: one relating to canned fruits and one relating to dried grapes. The decision on dried grapes and the argument over its adoption does not indicate agreement among the parties. However, the decision on canned fruit and the argument over its adoption does indicate agreement among the parties as to some, though not all, of the criteria for establishing non-violation nullification or impairment claims. Clearly, there was no agreement on whether adverse trade effects need to be proved. The EEC was only prepared to accept the report on the basis of an understanding which effectively would have removed from the report the paragraph in which the panel had stated that "it was not necessary to establish statistical evidence of damage in order to make a finding of nullification and impairment under Article XXIII" ⁽¹³⁷⁾. In accepting the report on that basis, the EEC would have been confirming that

(i) in these cases, it must be established that the measure in question could not have been reasonably expected at the time of the giving of the tariff binding; and

(ii) that this measure which overcompensated producers of canned fruit for the cost of raw fruit so as to completely insulate them from movements in the world prices of canned fruits could not have been reasonably expected.

In addition, the EEC did not take issue with the finding of the panel that it is not necessary for a party to establish an initial negotiating right in order to establish a right to a benefit accruing under the Agreement within the meaning of Article XXIII:1 ⁽¹³⁸⁾.

(137) L/5778, p. 28, para 77.

(138) L/5778, p. 17, para 50.

Therefore, the willingness to accept the report on the basis stated by the EEC also indicates agreement with this proposition. This last point is important to clarifying what is meant by reasonable expectation. It indicates that in non-violation claims, the relevant benefits are accorded to all other Members. Therefore, since the assessment of reasonable expectation applies to all members but not all members are necessarily involved in negotiation of every tariff concession, then it must be an objective rather than a subjective assessment of reasonable expectations.

6.5. *EEC tariff treatment on imports of citrus products from certain countries in the Mediterranean region - 1982.*

An unadopted panel report on EEC tariffs on imports of citrus products from certain Mediterranean countries is the only report in which there has been a finding of non-violation nullification or impairment of a benefit other than a benefit accruing under a tariff concession ⁽¹³⁹⁾. The case involved preferential arrangements between the EEC and a number of Mediterranean countries. The USA alleged that the preferential tariff rates on certain citrus fruits to these Mediterranean countries were violations of Article I and constituted nullification or impairment of benefits accruing to the USA under the Agreement.

The panel decided not to make a ruling on whether the preferences complied with Article I and, therefore, it fell to the panel to consider non-violation nullification or impairment. The reasons for the panel deciding not to rule on Article I are important to consideration of their conclusions on the non-violation claim. The panel noted that the preferential arrangement had been submitted for approval under Article XXIV but that no adjudication had been made under that Article as to whether the arrangement met the requirements of Article XXIV and was thereby entitled to an ex-

(139) "EEC - Tariff Treatment of Citrus Products from Certain Mediterranean Countries" L/5776 dated 7 February 1985, not adopted. The panel report is summarized in Hudec (1993, see fn100 above) Synopsis of Complaints, case no 113. See also Hudec (1993, see fn100 above) pp. 157-161, and Petersmann (1991, see fn6 above) pp. 210-213 or Petersmann (1997, see fn108 above) pp. 160-164.

emption from Article I. The panel said that a review under Article XXIV could only be conducted under Article XXIV:7 and not by an Article XXIII panel. Therefore, since it could not make a decision on conformity with the Article XXIV exception, it could not make a decision on whether there was a violation of Article I.

In considering the non-violation claim, the panel said that the two previous decisions on non-violation nullification or impairment (the “Ammonium Sulphate” and the “German Sardines” decisions) did not serve as precedents for this case. The panel noted that those findings were based on (a) the existence of a tariff concession; (b) the subsequent introduction of a measure which “upset the competitive relationship between the bound product with regard to directly competitive products from other origins” ⁽¹⁴⁰⁾; and (c) that “the measure could not have been reasonably anticipated by the party to whom the binding was made, at the time of the negotiation of the tariff concession” ⁽¹⁴¹⁾. The panel said that the present case could not be decided on that basis because, for some of the products, the tariff rates were not bound, and for those products that were bound, the relevant concessions were made in 1973 at which time the preferences already existed and their continuance could have been reasonably expected. Despite that finding, the panel made a finding of non-violation nullification or impairment on a wider basis. The panel enunciated and relied upon a more general principle underlying the notion of nullification or impairment:

“One of the fundamental benefits accruing to the contracting parties under the General Agreement was the right to adjustment in situations in which the balance of their rights and obligations had been upset to their disadvantage” ⁽¹⁴²⁾.

The panel referred to the fact that under the Article XXIV:7 process, the CONTRACTING PARTIES had refrained from adjudicating on conformity of the preferential arrangement with Article

(140) L/5776, para 4.26.

(141) As above.

(142) L/5776, para 5.1(g).

XXIV on the basis that other parties rights would "not be affected" and the panel concluded that

"the balance of rights and obligations underlying Articles I and XXIV of the General Agreement had been upset to the disadvantage of the contracting parties not parties to these [preferential] agreements. The United States was therefore entitled to offsetting or compensatory adjustment to the extent that the grant of the preferences had caused substantial adverse effects to its actual trade or its trade opportunities" (143).

The EEC blocked the adoption of the report on a number of grounds. At the centre of its objections was the threat to every agreement that had been or might be entered into in purported conformity with Article XXIV where there was no actual approval of the arrangement under Article XXIV:7. However, adoption of the report would have posed another risk. The panel's finding that there was uncertainty as to whether the arrangement conformed with Article XXIV necessarily "had to include the possibility" (144) that the arrangement did conform with Article XXIV. Therefore, the adoption of the panel would have been a recognition that it is possible for a free trade or customs union to cause a nullification or impairment of a benefit under Article XXIII even where the arrangement does comply with Article XXIV.

6.6. *EEC - Payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins - 1989.*

The question of nullification or impairment of a tariff benefit by a non-violation subsidy arose again in the Oilseeds case (145). In

(143) L/5776, para 5.1(g).

(144) Hudec (1993) p. 161, fn62.

(145) "EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related animal-Feed Proteins" (L/6627) adopted on 25 January 1990, GATT BISD 37S/86. "Follow-Up on the Panel Report "EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins" DS28/R, 31 March 1992, not adopted. The dispute is summarized in Hudec (1993, see fn100 above) Synopsis of Complaints, case no 179 at pp. 558-561. The particular parts of the reports relating to non-violation nullification

considering whether the dispute evidences agreement of the parties as to the meaning of Article XXIII:1(b), it is important to note that the dispute produced an initial panel report which was adopted but with several reservations made by the EEC at the time ⁽¹⁴⁶⁾ and that there was a follow-up report by the panel which did assist in the resolution of the dispute but which was not adopted by a decision of the CONTRACTING PARTIES.

The case concerned subsidies on a number of products traditionally used as animal feeds and commonly referred to collectively as oilseeds. The subsidy scheme for rapeseed and sunflowerseed had commenced in 1966, that for soybeans in 1974 and that for pulses in 1978. The subsidies were paid to EEC processors of oilseeds and were calculated as the difference between a target price for the relevant product and the import price of that product. The panel found that there was a breach of Article III:4 and that the subsidies did not fall within the exception in Article III:8(b) because the subsidies were not paid exclusively to domestic producers. It is beyond the scope of this paper to scrutinize the decision on Article III. It had also been argued that the subsidies nullified or impaired tariff bindings given by the EEC. Even though the panel had found that the subsidies were in violation of Article III:4, the panel decided to make a ruling on the nullification or impairment question because if there was nullification or impairment, it would be possible that bringing the measure into conformity with Article III:4 would not remove the nullification or impairment.

The EEC made a broad argument against the application of the non-violation concept to domestic subsidies. The EEC argued against creating a general rule from the principles deriving from the Ammonium Sulphate and German Restrictions on Sardines cases because they had dealt with very "particular and proximate" situations and because such a general application of those principles would effectively rewrite GATT rules by giving "protection to tariff concessions under Article II that went far beyond the precise rules

or impairment are discussed in Petersmann (1991, see fn6 above) pp. 217-218 & Petersmann (1997, see fn108 above) pp. 167-169.

(146) See L/6636 Memorandum of the EC dated 25 January 1990.

of that Article" (147). The EEC argued that recourse to the non-violation principle should remain an exceptional concept. The EEC emphasized the importance to this case of considering Articles VI and XVI and the interpretation of those articles embodied in the Tokyo Round Subsidies Code to which both the EEC and the USA were parties. While agreeing with the exceptional scope of the concept, the USA argued that this case fell within the traditional scope of the exceptional concept. The USA argued:

"a cautious approach should continue to be taken in applying the concept. The United States did not consider that any change of governmental policies, even if it has harmful trade effects, constitutes non-violation nullification or impairment. A contracting party does not have a reasonable expectation that a contracting party which grants it a tariff concession will not change general income tax rates. The complaint in the present case, however, is well grounded in the traditional approach of the GATT to non-violation nullification or impairment since most past cases have, like the present case, concerned impairment of tariff concessions through significant changes in governmental subsidy policies or measures affecting the competitive position of the product concerned" (148).

The panel decided that the general concept of non-violation nullification or impairment did apply to the present case. On the general purpose of Article XXIII:1(b), it said:

"that these provisions, as conceived by the drafters and applied by the CONTRACTING PARTIES, serve mainly to protect the balance of tariff concessions. The idea underlying them is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of an measure, whether or not it conflicts with the General Agreement" (149).

(147) GATT BISD 37S/86 at 116, para 109.

(148) GATT BISD 37S/86 AT 117-118, para 114.

(149) GATT BISD 37S/86 at 126-127, para 144. Compare Justice Pescatore's co-authorship of this explanation of the rationale for Article XXIII:1(b) with subsequent labelling of non-violation nullification or impairments as a "useless and

The inquiry into reasonable expectations necessitated a finding as to which were the relevant bindings. The EEC had given a series of bindings: first, in 1962, in the original Article XXIV:6/Dillon Round negotiation; then with each subsequent enlargement of the EEC, in 1972, with the accession of Denmark, the UK and Ireland; in 1981, with the accession of Greece; and, in 1986, with the accession of Spain and Portugal. The EEC argued that the relevant time for determining expectations was 1986 when the EEC common external tariff was most recently altered though an Article XXIV:6 procedure. The panel decided that the reasonable expectations to be protected were those which existed when the concessions were originally negotiated in 1962 ⁽¹⁵⁰⁾.

Then the panel stressed the difference between the EEC and the USA views on the reasonable expectations as to domestic subsidies, saying that the USA's argument was essentially based on the statement in the report of the 1955 Review of the Agreement that there is a presumption that a party negotiating a concession has a reasonable expectation that the "value of the concession will not be nullified or impaired ... by the subsequent introduction of a domestic subsidy" ⁽¹⁵¹⁾ and noting the counter argument of the EEC that

"it is not legitimate to expect the absence of production subsidies even after the grant of a tariff concession because Articles III:8(b) and XVI:1 explicitly recognize the right of contracting parties to grant production subsidies. This right would be effectively eliminated if its exercise were assumed to impair tariff concessions" ⁽¹⁵²⁾.

This difference of opinion may be viewed as a question about upon whom the onus lies to insert specific protection in schedules of concession relating to the use or absence of domestic subsidies. The EEC argument essentially places the onus on a party receiving a tariff concession to also negotiate either a specific restriction on

dangerous construction" (see PESCATORE, "The GATT dispute settlement mechanism - its present situation and its prospects" (1993) 70(1) *JIA* 27-41 at 41.

(150) GATT BISD 37S/128, para 146.

(151) GATT BISD 37S/86 at 128, para 147 quoting from "Other Barriers to Trade" report adopted 3 March 1955 in GATT BISD 3S/222 at 224.

(152) GATT BISD 37S/86 at 128, para 147.

the freedom of the party giving the concession to pay a domestic subsidy or that its own tariff bindings are conditional upon the other parties not introducing domestic subsidies. The USA argument places the onus on the party giving a tariff concession to reserve a right to pay domestic subsidies. The question is one of interpreting the treaty to determine where the parties intended that the onus should lie.

The panel avoids having to choose between the two views by making a finding of fact which enables it to take a narrower approach to its decision as to what domestic subsidies could be reasonably expected. The panel finds that these subsidies

“are product specific subsidies that protect producers completely from the movement of prices for imports and thereby prevent tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds. ... The United States could not reasonably have anticipated the introduction of subsidy schemes which protect producers completely from the movement of prices for imports and thereby prevent the tariff concession from having any impact on the competitive relationship between domestic and imported oilseeds” (153).

The panel drew back from a more general pronouncement in two ways. First, it did not say whether a domestic subsidy which only *partially* offsets the price effect of the tariff concession on the competitive conditions between imported and domestic products should be regarded as being beyond reasonable expectations. Secondly, it restricted itself to a *product specific* subsidy and did not say whether a subsidy which was not product specific could be regarded as being beyond reasonable expectations. The panel affirms the importance of competitive conditions and the irrelevance of actual trade effects saying that tariff bindings protect “commitments on conditions of competition for trade, not volumes of trade” (154).

The first oilseeds report became only the third report containing a finding of non-violation nullification or impairment that was adopted by that the CONTRACTING PARTIES. However, the

(153) GATT BISD 37S/86 at 128-129, paras 148-149.

(154) GATT BISD 37S/86 at 130, para 150.

report did not contain any recommendation to the CONTRACTING PARTIES to take any action to remove the nullification or impairment and the decision to adopt the report was accompanied by a reservation by the EEC on the finding of non-violation nullification or impairment particularly the finding that it was the expectations existing in 1962 that were protected under the tariff concession ⁽¹⁵⁵⁾. Therefore, even the more narrow finding of the panel cannot be regarded as having been agreed by all of the parties to the Agreement.

6.7. *Follow-Up Report of the Oilseeds Panel - 1992.*

The original Oilseeds panel reconvened in 1992 to consider whether amendments to the oilseeds subsidy schemes complied with the rulings of the original panel report ⁽¹⁵⁶⁾. The subsidy scheme had been altered in conjunction with wider reforms of the CAP. For oilseeds, the dual price support systems was replaced with a limited deficiency payment system. The new subsidy system was called a support system for producers of oilseeds ⁽¹⁵⁷⁾. Whereas under the former system, producers had received a target price because of the incentives provided to the processors to whom the producers sold their crops, under the new deficiency payment system, producers sold their crop at the market price but received an additional deficiency payment based upon the gap between the market price and a target price. The payment was made on a per hectare basis and was calculated according to a yield per hectare determined for each

(155) GATT Doc L/6636 dated 25 January 1990 described in Hudec (1993) Synopsis of Complaints, case no 179 on pp. 558-561 at p. 560.

(156) "Follow-Up on the Panel Report "EEC - Payments and subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins", report of the Members of the Original Oilseeds Panel, DS28/R, 31 March 1992 GATT BISD 39S/91. See at p. 91, "The Report was first considered by the Council at its meeting on 30 April 1992. At its meeting on 19 June, the Council without adopting the Report, authorized the Community to enter into negotiations under Article XXVIII:4 for modification of tariff concessions with respect to certain relevant tariff positions".

(157) See the heading and Article 1 of Council Regulation (EEC) No 3766/91 of 12 December 1991 establishing a support system for producers of soya beans, rape seed and colza seed and sunflower seed.

region of the Community. The amount paid per hectare was the difference between a target price and a reference world market price. However, the payment did not guarantee the target price in all circumstances:

(i) any produce in excess of the standard yield could be sold at the market price but was not eligible for any subsidy and had no bearing on the calculation of the per hectare subsidy; and

(ii) there could be a part of the difference between the reference world market price and the actual world price at which production was sold which would not be taken into account in calculation of the per hectare payment. This could occur, firstly, because of the timing of the determination of the reference world market price, and secondly, because the reference world market price specified in the regulations was not adjusted for fluctuations within an 8 percent band.

The panel took the view that the new subsidy system prevented the competitive conditions established by the zero tariff bindings from having any effect. If foreign sellers dropped their price, EEC producers could drop their price to match the price of imports but would not be receiving any less because the per hectare payment would be adjusted upwards as a result of the lower world price. However, the panel acknowledged that the finding in its earlier report was based upon the fact that the subsidy system *completely* protected domestic producers from movements in import prices and thereby prevented the tariff concessions from having any effect and noted that the new system did not completely protect domestic producers from movements in import prices. However, the panel indicated that there was

“nothing in the reasoning of the original Panel that indicated that the impairment of tariff concessions through a production subsidy could only take place through a subsidy which completely protected producers from the price movements of imports” (158).

The panel referred to a wider basis for the decision: that parties in tariff negotiations must “be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions

(158) DS28/R, p. 26, para 81.

will not be systematically offset" ⁽¹⁵⁹⁾. The panel found that the new subsidy system

"effectively offsets the general movement of import prices and renders the level of Community production substantially insensitive to the general movement of world prices, and thereby continues to impair the benefits the United States could reasonably expect to accrue to it under the tariff concessions in question" ⁽¹⁶⁰⁾.

This further finding and recommendation in the follow up report was not adopted and cannot be regarded as a decision of the CONTRACTING PARTIES. However, the EEC did enter into Article XXVIII negotiations to renegotiate the tariff concessions. This has been argued to constitute an admission by the EEC that the United States was entitled to some compensation, and, therefore, constituted an acknowledgement that the tariff bindings actually had been nullified or impaired by the subsidies ⁽¹⁶¹⁾. However, the authority of this view must be undermined to some extent by the fact that the EEC did not reach agreement on the Article XXVIII negotiation until it had been agreed that this type of complaint would not be possible under the Agriculture Agreement in future.

6.8. *Other Relevant Disputes.*

In a number of other cases, panels abstained from making findings on non-violation nullification or impairment displaying a reluctance to extend the scope of non-violation complaints. In the French Residual Restrictions case ⁽¹⁶²⁾ in 1962, the panel found that there was a violation and did not need to consider whether a non-violation nullification or impairment could be caused by a measure that pre-dated the binding or by a measure in conformity with an exception. In other cases in which non-violation nullification or impairment was argued, no violation was found but the panel avoided making a finding on nullification or impairment. In four complaints, the panel decided not to consider non-violation nullifi-

(159) DS28/R, p. 26, para 81.

(160) DS28/R, p. 27, para 83.

(161) Hudec (1993) p. 248.

(162) "French Import Restrictions", report adopted on 14 November 1962 (L/1921) GATT BISD 11S/94.

cation or impairment because it had not been pleaded either at all or in sufficient detail. By this approach, the panels avoided having to consider possible broadening of the non-violation principles:

(i) to benefits accruing other than under tariff concessions: in the Uruguay Recourse to Article XXIII complaint in 1962 ⁽¹⁶³⁾; in the EEC Sugar Export Subsidy Decisions in 1979 and 1980 ⁽¹⁶⁴⁾; and in the Japanese Semiconductors dispute in 1987 ⁽¹⁶⁵⁾;

(ii) more specifically, to the benefit accruing from compliance with Article XI:1 — in USA Restrictions on Sugar Imports under the Headnote in 1989 ⁽¹⁶⁶⁾; or

(iii) to benefits accruing under a third party's tariff concession: in EEC Sugar Export Decisions in 1979 and 1980.

In one case, the EEC Wheat Flour panel report of 1983, the panel simply abrogated its duty to adjudicate on the meaning of the non-violation provisions of the Tokyo Round Subsidies Code so as to avoid having to decide whether non-violation nullification or impairment could arise as a result of the effects of a measure in a third country market ⁽¹⁶⁷⁾. In another case where the report was not adopted, the Nicaraguan complaint against USA measures under Article XXI, the panel resorted to ridiculous reasoning in order to avoid having to decide whether non-violation nullification or impairment could result from a measure that conformed to the Article XXI exception ⁽¹⁶⁸⁾.

(163) "Uruguayan Recourse to Article XXIII" report adopted on 16 November 1962 (L/1923) GATT BISD 11S/95.

(164) "EC - Refunds on Exports of sugar - complaint by Australia", report of the panel (L/4833) adopted 6 November 1979, GATT BISD 26S/290; "EC - Refunds on Exports of Sugar, complaint by Brazil", report of the panel adopted on 10 November 1980 (L/5011) GATT BISD 27S/69.

(165) "Japan - Trade in Semi-Conductors" report of the panel adopted 4 May 1988 (L/6309) GATT BISD 35S/116.

(166) "Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions", report of the panel adopted on 7 November 1990 (L/6631) GATT BISD 37S/228.

(167) "EEC- Subsidies on Exports of Wheat Flour" GATT Doc SCM/42. See Hudec (1993) at 491.

(168) US Trade Measures Affecting Nicaragua, L/6053 dated 13 October 1986.

6.9. *Post-Uruguay Round Practice.*

Up to February 1998, there have not been any Appellate Body decisions or panel decisions adopted by the WTO which interpret any of the provisions relating to non-violation nullification or impairment ⁽¹⁶⁹⁾. Of the disputes to which panels were appointed but which have been settled or become inactive, two appear to have included arguments on the basis of non-violation nullification or impairment ⁽¹⁷⁰⁾.

A number of the active panels may have to decide on non-violation claims. A claim by the USA in respect of Japanese laws relating to internal sale and distribution of photographic film raises a question of whether such competitive practices or the absence of law to restrain them can be regarded as a nullification or impairment ⁽¹⁷¹⁾. Other cases raise the issue of whether measures justified under exceptions in Article XX or XXI can cause nullification or impairment ⁽¹⁷²⁾. A number of complaints at the consultation stage also raise non-violation issues ⁽¹⁷³⁾.

(169) Up to and including the 10th Appellate Body decision to be adopted which was "Argentina - Certain Measures Affecting Imports of Footwear, Textiles, apparel and Other Items" (WT/DS56 adopted 22 April 1998).

(170) Judging by the brief details in the WTO Summary of Disputes in <http://www/wto/org/wto/dispute/bulletin.htm>; "Japan - Measures affecting the Purchase of Telecommunications Equipment" (WT/DS15) and "Australia - Textiles, Clothing and Footwear Import Credit Scheme" (WT/DS57).

(171) "Japan - Measures Affecting Consumer Photographic Film and Paper" complaint by the USA (WT/DS44). For a description of the relevant laws involved in this dispute, see BARRINGER, WILLIAM H. & DURLING, JAMES P., *Out of Focus: The Use of Section 301 to Address Anticompetitive Practices in Foreign Markets* (1996) *UCLA Jnl of Int'l Law and Foreign Affairs* 99-142; LAKE II, CHARLES D., & RICCARDI, JENNIFER DANNER, *Market Access Barriers in the Japanese Consumer Photographic Film and Paper Sector - Can Section 301 Address The Problem* (1996) 1 *UCLA Jnl of Int'l Law and Foreign Affairs* 143-180.

(172) "Japan - Measures Affecting Consumer Photographic Film and Paper" complaint by the USA (WT/DS44) "United States - The Cuban Liberty and Democratic Solidarity Act" (WT/DS38) in respect of import prohibitions of goods originating in Cuba and restrictions on movement of people in connection with its economic embargo on Cuba (the panel suspended its work on 21 April 1997 and the panel's authority lapsed on 22 April 1998); "United States - Import Prohibition of Certain Shrimp and Shrimp Products" (WT/DS58) in respect of shrimps caught by methods not meeting US standards for protecting turtles - in this case, on 15

7. *Rules of international law relevant to interpretation of provisions relating to non-violation complaints.*

Under Article 31 of the Vienna Convention on the Law of Treaties, the non-violation provisions of the WTO Agreements must be interpreted in the context of "relevant rules of international law applicable in the relations between the parties".

7.1. *The WTO in the context of International Law Relating to State Responsibility.*

It is worth considering whether the non-violation provisions can be regarded as a manifestation of general principles of state responsibility. It is an established rule of customary international law that states are responsible for their wrongful acts⁽¹⁷⁴⁾. For their wrongful acts, States must make restitution or pay reparations to injured states⁽¹⁷⁵⁾. A breach of a treaty is a wrongful act⁽¹⁷⁶⁾. There are a number of aspects of the general principles of state responsibility which are difficult to apply to the WTO system

May 1998, a panel report was circulated to the parties which report found a violation and did not address the non-violation question; "European Communities - Measures Affecting Importation of Certain Poultry Products" (WT/DS69); Japan - Measures Affecting Agricultural Products" (WT/DS76/1) in respect of quarantine restrictions.

(173) "Brazil - Certain automotive Investment Measures" (WT/DS/51); Brazil - Certain Measures Affecting Trade and Investment in the Automotive Sector (WT/DS/52; (WT/DS/65); and (WT/DS/81/1); "USA - Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS/61); "Japan - measures affecting Imports of Pork" (WT/DS/66); "Philippines - measures affecting Pork and Poultry" (WT/DS/74/1); USA - Safeguard Measures against Imports of Broom Corn" (WT/DS/78/1); "Belgium - Measures affecting Commercial Telephone Directory services (WT/DS/80/1); USA - measures affecting Government Procurement (WT/DS/88/1); "India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products" (WT/DS/93/1); and USA - Tariff Rate Quota for Imports of Groundnuts" (WT/DS/111/1).

(174) See International Law Commission, Draft Articles on State Responsibility Part I Article 1 [1980] YB Int Law Comm 30.

(175) See ILC Draft Articles on State Responsibility Part II, Article 6 [[1984] 2 YBILComm 19.

(176) See ILC, Draft Articles on State Responsibility Part I, Articles 3, 15 & 17.

generally and are even more difficult to apply to non-violation complaints.

First, the generally accepted rule relating to restitution or reparations is that as far as possible the consequences of the wrongful act should be wiped out ⁽¹⁷⁷⁾. However, the WTO Agreement provides remedies which are prospective in nature and which do nothing to recompense for past injury ⁽¹⁷⁸⁾. While there may not be universal agreement on this point, it is submitted that the remedies provided under the Agreement are the only remedies available ⁽¹⁷⁹⁾. Secondly, there is some contention about whether and the extent to which acts which are not violations of international law may be the basis of any state responsibility. To the extent that it has been argued that states are responsible for the consequences of acts not prohibited by international law, the presence of physical harm has been regarded as a pre-requisite to state responsibility ⁽¹⁸⁰⁾. Thirdly, the incurring of state responsibility on the part of one state toward another state or other states does not in itself release the other state or states from other obligations owed toward the first state under a multilateral treaty. Whether the other state can be released from those obligations depends on the rules relating to termination or suspension of treaties as modified by the particular multilateral treaty ⁽¹⁸¹⁾. Therefore, the general principles

(177) See the statement of the law by the Permanent Court of International Justice in the *Chorzow Factory Case*, PCJ Series A No.17 (1928)

(178) See Petersmann (1994, see fn6 above) at 1177-1178, and Petersmann, (1991, see fn6 above) at 184-185.

(179) See Jackson, (1969, see fn82 above) at pp. 163-164 (saying that "the practice in GATT is to rely mainly on the provisions of GATT itself for legal redress"), Petersmann (1991, see fn6 above) at 193-196; but see the qualification made by Pescatore that the ordinary law of countermeasures may apply if operation of the dispute settlement system is frustrated by one of the parties: PESCATORE, Pierre, "The GATT Dispute Settlement Mechanism" (1993) 27(1) *JWT* 5-20 at 15.

(180) See "The Proposed Articles on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law" [1990], YBILC Vol. II, Part One (some of which were provisionally adopted by the ILC at its 47th session: see [1995] YBILC Vol. I, p. 308 & (for the text of those articles) [1994] YBILC Vol. I, Part Two, pp. 159-160.

(181) See Draft Articles on State Responsibility, Part I, Article 11.

of state responsibility do not provide any basis for parties being released from obligations under the WTO Agreement because of a non-violation.

7.2. *The International Law of Treaties Relating to Good Faith Observance of Obligations.*

It is a rule of customary international law and of the Vienna Convention that treaty obligations must be performed in good faith⁽¹⁸²⁾. This rule is fundamental to the basic norm of treaty law: *pacta sunt servanda*; and in the Vienna Convention, the rules of *pacta sunt servanda* and the rule of good faith are expressed together in article 26:

“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

The good faith principle obliges parties to treaties to carry out the “substance of [their] mutual understanding honestly and loyally”⁽¹⁸³⁾. This means that parties should not act inconsistently with the mutual understanding intended to be embodied in a treaty even if acting in strict accordance with the letter of the agreement. Given the general rule of treaty interpretation that it is the reduction of the mutual understanding to writing which is to be enforced, then in effect, the principle requiring treaties to be performed in good faith is an overriding principle of treaty interpretation, that is, that “the ascertainment of the mutual understanding ... is governed by the principle of good faith”⁽¹⁸⁴⁾.

Consideration of this principle is important in determining the scope of non-violations in the WTO system. The principle of good faith would require that Article XXIII:1(a) of the GATT and also all other ‘violation’ clauses in any part of the WTO Agreement should

(182) Generally on the principle of good faith, see BIN CHENG, *General Principles of law as applied by International Courts and Tribunals* (Grotius Publications, Cambridge, 1987) pp. 105-160 and J.F. O’CONNOR, *Good Faith in International Law* (Dartmouth Publishing Co, Aldershot, 1991).

(183) Bin Cheng, as above, at p. 115.

(184) Bin Cheng, as above, at p. 115.

be interpreted so that acts not inconsistent with the letter of the provisions which evade or circumvent the mutual understanding embodied in the treaty can be treated as treaty violations. This means that *even without* the express adoption of 'non-violation' complaints in the WTO Agreement, it would be possible for measures which do not directly breach the literal words of the Agreement to constitute violations and it would be possible for the DSB to authorize countermeasures in response to such measures. This has two important ramifications for this inquiry into the proper scope of non-violation complaints:

(1) whether any of the instances of application of the dispute settlement mechanisms of the GATT which have been regarded by legal analysts as instances of application of the 'non-violation' provision in paragraph 1(b) of Article XXIII might more properly be regarded as applications of the 'violation' provision in paragraph 1(a); and

(2) whether, taking into account the principle of effectiveness in treaty interpretation, the fact that there are separate and express provisions dealing with non-violations means that those provisions should be interpreted to have some effect which goes beyond the mere application of the good faith principle to all of the other provisions?

It may be possible to construe the behaviour of Australia in the Ammonium Sulphate case and the behaviour of Germany in the Imports of Sardines case as being situations where the defendant country failed to comply with its obligations in good faith. However, to characterize the behaviour of the EEC which gave rise to the Oilseeds case as conduct in bad faith would involve an assumption about tariff bindings necessarily being accompanied by an implied understanding regarding domestic subsidies. The practice of the parties does not display a clear consensus as to such an implied understanding regarding domestic subsidies and it seems that the decision in the Oilseeds case on the basis of non-violation nullification or impairment interprets Article XXIII:1(b) as having an effect which goes beyond the good faith principle.

7.3. *The International Law of Treaties and the Doctrine of Rebus Sic Stantibus.*

The existence of the doctrine of *rebus sic stantibus* is broadly accepted but its scope and even its conceptual basis are difficult to define ⁽¹⁸⁵⁾. The essence of the doctrine is that a fundamental change of circumstances can dissolve a treaty. However, there is considerable uncertainty as to whether the dissolution of the treaty occurs pursuant to operation of law or pursuant to an implied contractual term and whether the doctrine is restricted to treaties of fixed or indefinite term. As to the type of change of circumstances required, many writers suggest that the doctrine is restricted to changes in circumstances, the continuance of which, the parties regarded as essential to the continuance of the binding force of the treaty ⁽¹⁸⁶⁾. Article 62 of the Vienna Convention provides for termination of treaties on the ground of fundamental change of circumstance and the International Court of Justice has stated that Article 62 is "in many respects" a codification of customary international law on the matter ⁽¹⁸⁷⁾. Article 62 permits termination or suspension of a treaty if there is an unforeseen change of fundamental circumstances, which circumstances constituted an essential basis of the consent of the parties and which change has the effect of radically transforming the extent of obligations to be performed under the treaty.

Therefore, even without the non-violation provisions of the WTO Agreement, parties would be able to suspend their obligations under the WTO Agreement in the event of a non-violation measure

(185) Generally, see International Law Commission Report [1966] 2YBILC 169 at 256-258 extracted in L. HENKIN, R. PUGH, O. SCHACTER & H. SMIT, *International Law: Cases and Materials* (West Publishing Co, St Paul, Minn., 2nd ed, 1987) at 662-664; BISHOP, W., *International Law: Cases and Materials* (Prentice Hall, New York, 3rd ed, 1971) pp. 218-220; also MARTIN DIXON, *Textbook on International Law* (Blackstone Press, London, 2nd ed, 1993) pp. 64-65; HARRIS, DJ, *Cases and Materials on International Law* (Sweet & Maxwell, London, 4th ed, 1971) pp. 799-803.

(186) See Harvard Research in International Law quoted in Bishop, as above, at 218.

(187) *Fisheries Jurisdiction Case (Jurisdiction) (UK v Iceland)* [1974] ICJ Rep 3 at para 36.

or situation if the measure or situation manifested a fundamental change of circumstances in the sense of the principle of *rebus sic stantibus*. In order for obligations to be suspended on a discriminatory basis against a particular Member, it would be necessary to satisfy the test in Article 62 in respect of both the MFN rule and in respect of the particular obligation suspended. This has two important ramifications for this inquiry into the proper scope of non-violation complaints:

(1) whether any of the instances of application of the dispute settlement mechanisms of the GATT which have been regarded by legal analysts as instances of application of the 'non-violation' provision in paragraph 1(b) of Article XXIII might more properly be regarded as applications of the principle of *rebus sic stantibus*; and

(2) whether, given that the principle of *rebus sic stantibus* cannot provide an entitlement to suspend obligations in the case of changes of circumstances which are less than fundamental, and taking into account the principle of effectiveness in treaty interpretation, the fact that there are separate and express provisions dealing with non-violations means that those provisions should be interpreted to have some effect which goes beyond the effect of the application of the principle of *rebus sic stantibus*?

It is uncertain though unlikely that the *rebus sic stantibus* doctrine can have application to the situation where it is an action of one of the parties that itself is the fundamental change of circumstances. On that basis alone, it seems extremely unlikely that any of the changes of circumstances in the Ammonium sulphate case, the German Imports of Sardines case or the Oilseeds case could be regarded as being situations to which the *rebus sic stantibus* doctrine could have applied.

Two other matters make it difficult to apply the *rebus sic stantibus* doctrine to the WTO treaties. Whilst a complete nullification of the benefit of competitive conditions might be regarded as a fundamental change of circumstances, it is more difficult to regard a partial impairment, that is, a smaller adverse effect on the benefit of competitive conditions as a fundamental change of circumstances. Secondly, the *rebus sic stantibus* rule can result in the termination of obligations under a treaty. It could only perform the

rebalancing function under the GATT or GATS if each tariff concession or scheduled commitment could be regarded as a separate treaty which could be terminated or suspended whilst leaving the overall treaty in place ⁽¹⁸⁸⁾.

It is submitted that the WTO treaties do not exclude the operation of the *rebus sic stantibus* doctrine and that it is possible for the doctrine and the non-violation provisions to operate at the same time. The two above-mentioned difficulties in applying the *rebus sic stantibus* doctrine to the WTO treaties do not pose any problem for the application of the non-violation provisions themselves.

7.4. *The Existence in International Law of a Rule Protecting Legitimate Expectations.*

This inquiry should consider whether there is, in international law, a rule to the effect that legitimate expectations should be protected so that states are entitled to suspend the operation of their own treaty obligations in situations in which their legitimate expectations are not met.

From the analysis set out above, we can state, first, that the application of the obligation to perform treaty obligations in good faith implies the protection of such legitimate expectations as arise from the interpretation in good faith of the mutual understanding embodied in the words of the treaty and, second, that the application of the *rebus sic stantibus* doctrine protects such legitimate expectations arising from a treaty as to circumstances which are fundamental to the giving of consent to the treaty and the change of which would be both unforeseen and would radically transform the obligations under the treaty. The more appropriate question is whether there is a principle relating to the protection of legitimate expectations that goes beyond the protection of legitimate expectations that is inherent in the application of both the *pacta sunt*

(188) See COTTIER & SCHEFER, *Non-violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future* in PETERSMANN, *International Trade Law and the GATT/WTO Dispute Settlement System* (Studies in Transnational Economic Law) (Kluwer, London 1997) pp. 143-183 at p. 173.

servanda rule and the principle of good faith and also in the application of the doctrine of *rebus sic stantibus*.

The law of treaties clearly only protects the legitimate expectations which are held in common by the parties and are ascertainable by interpretation of the treaty. Clearly, the law of treaties does not protect the expectations of one party to a treaty unless they have been incorporated into the treaty. As to the existence of a rule of customary international law protecting the legitimate expectations, it does not seem that a convincing case could be made that there exists such widespread and general state practice accompanied by *opinio juris* such as would support the existence of such rule ⁽¹⁸⁹⁾. The protection of legitimate expectations might be a general principle of law in the sense of Article 38(1)(c) of the Statute of the ICJ. Indeed, protection of legitimate expectations is a principle of European Union law protecting substantive expectations and protection of procedural expectations is a principle of administrative law in many jurisdictions ⁽¹⁹⁰⁾. I leave for other scholars the task of making a comprehensive assessment of the extent to which a principle of protection of substantive rather than merely procedural expectation is a generally recognized principle of law. Whilst leaving the question open, I submit that it has not been established that the protection of substantive rather than merely procedural expectations is a general principle of law recognized widely enough to be a general rule of international law.

7.5. *Relevant Principles of International Law.*

Whilst these general principles are not excluded from applying to the WTO Agreement (with one exception), it has been argued

(189) Cf Cottier & Schefer, (see fn 189 above) esp at 163-181.

(190) On the application of the principle in the EU, see CRAIG, "Substantive Legitimate Expectations in Domestic and Community Law" (1996) 55(2) *The Cambridge Law Journal* 289-312; ELEANOR SHARPSTON, *Legitimate Expectations and Economic Reality* (1990) 15 *Eur. Law Review* 103-160; SHARPSTON, *European Community Law and the doctrine of legitimate expectations: how legitimate and for whom?* (1990) 11 *Northwestern J of Int'l Law* 87-103; HJ MACKENZIE STUART, *Legitimate Expectations and estoppel in community law and English administrative law* (1983) 1 *Legal Issues of European Integration* 53-73.

that these general principles do not constitute an appropriate theoretical basis for non-violation complaints. It was argued in relation to specific principles that:

(i) non-violation nullification or impairment is not an application of general principles of state responsibility;

(ii) the good faith principle could apply to render some non-violation situations violation and it is possible that some GATT decisions on non-violation situations can be regarded as having involved bad faith;

(iii) while the doctrine of *rebus sic stantibus* could apply to non-violation situations, it does not explain any of the decisions that have been made on non-violation nullification or impairment;

(iv) non-violation nullification or impairment cannot be regarded as an application of a more general rule relating to the protection of legitimate expectations because there is no such general rule in international law outside the general protection of expectations that arise from the *pacta sunt servanda* principle and from the *rebus sic stantibus* doctrine;

It was noted, though, that the WTO treaties are subject to the *pacta sunt servanda* principle and that it is implicit in this principle that obligations must be performed in good faith and that the obligations under a treaty embrace the carrying out and compliance with such legitimate expectations as arise from the interpretation of the treaty in good faith.

8. *Consideration of preparatory work of the treaties.*

The ambiguities in interpretation of the non-violation provisions justify some recourse to the preparatory records relating to the negotiation of the provisions, those relating to 1947 and those relating to the Uruguay Round.

8.1. *Preparatory Work For Article XXIII Of The GATT 1947.*

The preparatory records relating to the GATT are part of the deliberations of the Preparatory Committee for the 1948 UN Conference on Trade and Employment. The principal function of the

Preparatory Committee was to prepare a draft charter of an International Trade Organization ('ITO') to be presented to the UN Conference. In most respects, the GATT was drafted upon the basis of chapter V of the draft ITO charter. Article XXIII of the GATT was copied from Article 89 of chapter V of the Geneva draft of the draft ITO charter. The problem with trying to extract an indication of the intended meaning of Article XXIII from the conference records relating to the negotiation of Article 89 is that, in the draft Charter, Article 89 was substantially interlinked with provisions in other chapters of the draft Charter. Therefore, whatever the records indicate about the intended meaning of Article 89 of the draft Charter, it does not follow that the same intention can be ascribed to Article XXIII of the GATT.

The clear precedent for the wording of Article XXIII of the GATT was the wording used by the United States in bilateral trade treaties prior to 1945 ⁽¹⁹¹⁾. Such treaties provided for consultations to occur in the event of measures which nullified or impaired an object of the treaty "even though [the measure] does not conflict with the terms of [the] Agreement" ⁽¹⁹²⁾. However, they provided for consultations only and did not provide for rights to be released from obligations. In fact, these agreements commonly did not have any provision providing for rights to be released from obligations in the event of violation either. The main reason for this was that the agreements could be terminated on 6 months notice or on even shorter notice if certain types of restrictions were introduced without the agreement of the other party.

When the USA submitted a Suggested Charter for the ITO, the draft contained almost identical words to the USA-Mexico bilateral agreement relating to consultations in the event of a measure nullifying or impairing objectives of the chapter of the charter

(191) For a list of US bilateral trade agreements in this period, see Cottier & Schefer (1997, see fn188 above) at fn14 at p. 150.

(192) *USA- Mexico Reciprocal Trade Agreement*, done 23 December 1942, Washington, Treaties and Other International Agreements of the United States of America 1776-1949 (Department of State Publication 8615, 1972) Vol. 9, p. 1109; 57 Stat 833, Executive Agreement series 311.

relating to commercial policy (193). It applied "whether or not [the measure] conflict[ed] with the terms of the Chapter" (194). However, the provision went a step further in providing that following such consultations, the Organization would be able to permit the complaining party to suspend obligations owed to the other Member. This clause like the rest of the Suggested Charter, was the basis for the negotiation at the First ('London') Session of the Preparatory Committee for the UN Conference (195). The draft adopted by that first session, called the London draft (196), included a chapter on commercial policy which included a consultations clause like that in the Suggested Charter with a few changes. First, it applied not only to measures adopted by members but also "any situation that has arisen" (197). Secondly, it applied to nullification or impairment of any objective of the *charter* rather than merely to an objective of the *chapter* of the charter which dealt with commercial policy. The Charter also contained chapters on employment, economic development, restrictive business practices and inter governmental commodity arrangements. The chapter on employment contained obligations on Members to take "action designed to achieve and maintain full and productive employment and high and stable levels of demand within their own jurisdiction" (198), to take "appropriate

(193) United States, *Suggested Charter for an International Trade Organization of the United Nations*, US Department of State Publication No 2598, Commercial Policy Series No 93 (1946) pIII (citation from Hudec 1990 p12 fn3). The Suggested Charter is also published as "United States Draft Charter", Annexure 11 to the *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment* UN Doc E/PC/T/33 (London, October 1946).

(194) USA Suggested Charter, Article 30.

(195) Generally on the negotiation of this clause, see BROWN, Jr., William Adams, *The United States and the Restoration of World Trade* (The Brookings Institution, Washington DC, 1950) pp. 90-93 and Hudec (1990, see fn101 above) chapter 4 "The ITO Legal system: Nullification and Impairment".

(196) "Draft Charter for an International Trade Organization" ('London Draft') in *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, UN Doc E/PC/T/33 (London, Oct 1946) ('Report of the London Session').

(197) London Draft, Article 35.

(198) London Draft, Article 4.

and feasible" action "to eliminate substandard conditions of labour in production for export and generally throughout their jurisdiction" (199), and to "make their full contribution to action designed to correct ... maladjustment[s]" in the balance of payments between countries (200). In presenting the London draft, the Report of the First Session stresses that the revised article provides for the suspension of the commercial policy obligations in Chapter V of the draft charter in response to nullification or impairment of any object of the whole charter, and it makes specific mention of chapter III on Employment (201). The commentary gives two examples of the types of cases in which Members might seek to be released from their obligations that would fit within the broader formulation but not within the narrower formulation:

(i) "on the ground that its economy is suffering from deflationary pressures caused by the lack of effective demand for its goods from abroad (possible impairment of the objectives of Chapter III)" (202);

(ii) "in order to adjust competitive conditions between two exporting countries (for example, in cases in which one of the exporting countries is deliberately exploiting sub-standard labour contrary to the objectives of Chapter III)" (203).

Brown cautions that the commentary to the London report was not negotiated word for word as was the text of the London draft of the charter (204). Therefore, with caution, we might take this commentary as indicative of the intentions and understanding of the participants as to the meaning of the nullification or impairment clause. Since the other chapters of the charter never came into force, the important point here is what the commentary says would *not* have fallen within the meaning of the clause if the word 'chapter' had not been changed to 'charter'. This would confirm the interpretation of Article XXIII of the GATT as not applying to measures

(199) London Draft, Article 6.

(200) London Draft, Article 7.

(201) Report of the London Session, p. 11, para 4(b).

(202) Report of the London Session, p. 11, para 4(c)(i).

(203) Report of the London Session, p. 11, para 4(c)(ii).

(204) Brown (1950, see fn196 above) p. 93.

which simply depress consumer demand or to measures constituting non-specific regulatory subsidies.

The draft ITO charter was reviewed at the New York meeting of the Drafting Committee of the Preparatory Committee ⁽²⁰⁵⁾. This meeting also produced the first comprehensive draft of the GATT. The New York draft of the ITO charter amended the nullification clause in the London draft so that it could be triggered by subsisting measures or situations in addition to prospective ones by changing "has adopted any measure" to "is applying any measure", and "any situation has arisen" to "any situation exists" ⁽²⁰⁶⁾. This same nullification or impairment clause is reproduced in the New York draft of the GATT except that there it refers to nullifying or impairing any object "of this Agreement" rather than, as in the draft ITO charter, "in this Charter" ⁽²⁰⁷⁾.

At the Geneva session of the Preparatory Committee, at the end of which the GATT was signed, the clause was subject to much debate and a revised version emerged as Article 89 of the Geneva draft of the ITO Charter and as Article XXIII of the GATT. The wording is identical except for the change of the word "Charter" to "Agreement". The argument over the clause was partially concerned with the devolution of supra-national power to the international organization. It also focused on the question of whether it should be possible to relieve members from obligations owed to a member not only in the situation where that Member would be in default but also in situations in which the member would not be in default. The major critic of permitting the clause to apply to non-violations was the South African delegate, Dr Holloway. He expressed the view of the South African delegation, that the ability to retaliate should only be available in the case of violations

(205) See the "Report of the Drafting Committee of the Preparatory Committee", UN Doc E/PC/T/34/Rev 1, 29 May 1947 (UN Publication Sales no: 1947.II.3.) (New York Report').

(206) See Article 35(2) of the New York draft of the ITO Charter in "Report of the Drafting Committee of the Preparatory Committee" UN Doc E/PC/T/34/Rev 1 at p. 30.

(207) Compare Article XIX(2) of the New York draft GATT with Article 35(2) of the New York draft ITO Charter, both in E/PC/T/34/Rev 1.

“we should, whenever sanctions are provided for, limit their application to specific and contractual obligations and limit it very severely, and, where there is any doubt whether it is specific, contractual or not, or goes beyond it, then, in order to steer clear of vesting in the ITO international sovereignty, we should rather arrange for those doubtful matters to be subject to consultation and not subject to sanctions” (208).

He concluded dramatically:

“Mr Chairman, there is a saying in english: “The road to Hell is paved with good intentions.” We have a large number of good intentions in the charter: I hope we are not laying paving stones to Hell” (209).

The chief supporter of the breadth of the clause was the Australian delegate, the economist, Dr HC Coombs. His response to Dr Holloway’s concerns was that the whole theory that tariff reductions are beneficial depends upon certain assumptions of full employment and balance of payments. He argued that obligations in other chapters of the charter were intended to create the conditions which are essential to obtaining a better allocation of the world’s resources from tariff reductions. Therefore, he said that the commercial policy obligations must be linked to achievement of the objectives of the other chapters of the charter.

“we would resist bitterly any proposal to modify the right of a country to seek a modification of the undertakings it has given if, by the action of others, conditions are created in which it can no longer carry out those undertakings. In other words, if there is a world-wide collapse of demand; if a shortage of a particular currency places us all in balance-of-payments difficulties; if we become subject again to wide-spread fluctuations in the prices of primary products with devastating effects upon individual economies; if it is not possible in those circumstances to seek with international approval, a modification of particular undertakings we have given,

(208) Verbatim Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, fifth meeting of commission A on 30 May 1947, UN Doc E/PC/T/A/PV/5, 30 May 1947, at p. 10.

(209) E/PC/T/A/PV/5 at p. 10.

then we must think twice — indeed many times — about whether we can honestly undertake those obligations” (210).

At the next meeting, the USA supported the application of the dispute settlement clause to non-violations. The USA delegate, Clair Wilcox emphasized that the purpose of the clause was not to provide for sanctions and retaliation but was to maintain the balance of benefits that would be established by the exchange of tariff concessions. Wilcox says that the balance of interests resulting from the negotiations

“rests upon certain assumptions as to the character of the underlying situation in the years to come. And it involves a mutuality of obligations and benefits. If with the passage of time, the underlying situation should change or the benefits accorded any Member should be impaired, the balance would be destroyed. It is the purpose of Article 35 [corresponding to GATT Article XXIII] to restore this balance by providing for compensatory adjustment in the obligations which the Member has assumed” (211).

The rest of the delegates had little to contribute. There was some discussion about whether the clause should be located in the commercial policy chapter of the charter or at the end of the charter but none on the question of whether the authorization of retaliation ought also to apply to non-violations (212). Only Dr Holloway speaks against the substance of the clause, saying that sanctions should be applicable to violations but that non-violations should be dealt with by consultations and not by sanctions (213).

On 12 June 1947, the preparatory conference considered a new draft of the clause submitted by the Australian delegation (214). The

(210) E/PC/T/A/PV/5 at p. 14.

(211) Verbatim report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Sixth Meeting of Commission A on 2 June 1947, UN Doc E/PC/T/A/PV/6, 2 June 1947 at p. 5. See the longer quote including this passage in JACKSON, *World trade and the Law of GATT*, (1969), pp. 170-171.

(212) Perhaps a clue to the reason for the failure to focus on the important issue lies in the Chairman's passing reference to the “tropical heat”. See E/PC/T/A/PV/6 at p. 12, per Chairman Mr Max Suetens.

(213) E/PC/T/A/PV/6 at p. 19.

(214) Verbatim Report of the Twelfth Meeting of commission A on 12 June

new draft introduced the two strands of Article XXIII; one dealing with nullification or impairment of benefits and another dealing with impeding the promotion of the Purposes of the Charter. It still dealt with benefits under *and* "Purposes" of the whole charter not just the commercial policy chapter ⁽²¹⁵⁾. Introducing the proposed clause, Dr Coombs spoke of the meaning of the word "benefits":

"I should like to emphasize that by the word "benefits" we conceive not merely benefits accorded for instance, under the provisions of Article 24 [of the New York draft which related to tariff concessions], but the benefits which other countries derive from the acceptance of the wider obligations imposed by the Charter: that is the benefit which we, amongst other people, would derive from the improvements in the standard of living resulting from the operations of Chapter IV to countries with under-developed economies. So I would like to make it quite clear that we have used benefit in this context in a very wide sense" ⁽²¹⁶⁾.

Again the debate focused on whether the clause should be located in the commercial policy chapter or should apply to all of the charter. A suggestion of the UK delegate, Mr Shackle, resulted in the words "benefit accorded" being changed to "benefit accruing" ⁽²¹⁷⁾. Again, it was Dr Holloway who raised a question about the broad scope of the clause. He asked Dr Coombs whether the maintenance of high tariffs by Australia might prevent another member from increasing employment as it would be obliged to do under the charter ⁽²¹⁸⁾. Dr Coombs replied that such a situation would not be an impairment of a benefit accruing under the Charter but that it might impede the promotion of the purposes of the Charter. He went on to admit the difficulty of interpreting such a vaguely worded clause:

"The difficulty with a clause of this sort, however, is that it is designed to deal with situations about which it is fairly difficult to be precise. For instance, the first sub-paragraph

1947 of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/A/PV/12, 12 June 1947 at pp. 6-7.

(215) See Hudec (1990) p. 43 citing E/PC/T/W/170, 6 June 1947.

(216) E/PC/T/A/PV/12, p. 7.

(217) E/PC/T/A/PV/12, p. 19.

(218) E/PC/T/A/PV/12, p. 21.

"(i) the application by another Member of any measure, whether or not it conflicts with the provisions of this Charter"

is, I think, taken over automatically from a standard clause in the old type of Trade Agreement and was designed, I presume to deal primarily with possible attempts to evade obligations accepted in an exchange of tariff concessions" (219).

Coombs did not mention that in the old trade agreements the clauses could lead only to consultations and not to retaliation. He conceded that the words are broad even admitting "we might give a prize to anybody with sufficient ingenuity to find something that is not covered" (220) but he said that :

"... we will be prepared to rely upon the Organization ... interpreting a clause like this reasonably, to ensure that complaints are made on matters which are relevant to the general subject matter for which the Organization is responsible" (221).

However, Dr Coombs acknowledged the validity of Dr Holloway's concerns that the clause might be used

"to interfere in the domestic policies of another country when they are not, to any significant degree, affecting the commercial welfare of the complaining country, or where they are fundamentally irrelevant to the purposes of the charter" (222)

and he said that none of the participants in the conference would desire

"that as a result of this clause, either his or any other country's domestic policies, insofar as they are not international in their impact, should become a subject of question and investigation by the International Trade Organization, and possibly released from other obligations" (223).

He continued to speak of the need for the members to trust the organization to "interpret the clause intelligently and with sufficient

(219) E/PC/T/A/PV/12, pp. 22-23.

(220) E/PC/T/A/PV/12, p. 24.

(221) E/PC/T/A/PV/12, p. 24.

(222) E/PC/T/A/PV/12, p. 24.

(223) E/PC/T/A/PV/12, p. 25.

discretion" (224). The significant thing about these statements is that the strongest supporter of permitting suspension of obligations in response to non-violations clearly contemplated that the clause should not be interpreted literally. Despite the caution about the breadth of the clause, the conference referred the matter for further consideration to a drafting sub-committee which was to "take the Australian proposal as a basis for discussion" (225).

The drafting sub-committee returned drafts of the ITO Charter to the Preparatory Committee. However, the sub-committee's report was qualified by a statement indicating that the dispute settlement provisions had not been fully discussed in London, not at all in New York and insufficiently in Geneva and that the drafts contained in its report had been prepared on the assumption that this subject would "receive early and full re-examination" by the UN Conference (226). The nullification and impairment clause became Article 89(2) of the Charter. The Australian proposal was substantially adopted. When the conference reviewed the new draft of the Charter, the only delegate to speak against this article was Dr Holloway who again dramatically denounced the clause. He was so scathing in his criticism that it seems possible that he had resiled from his earlier acceptance of the first limb of the article. He spoke of

"sins which we have not yet discovered and which after long examination we cannot define; but there being such sins, we will provide some sort of punishment for them if we find out what they are and if we find anybody committing them ... and in spite of the fact that we do not know under what circumstances we are going to apply any punishment to them, we shall still provide a sort of vague and general "sword of Damocles", if such a thing is possible, to hang over the head of all the people who may possibly commit this sin" (227).

(224) E/PC/T/A/PV/12, p. 25.

(225) E/PC/T/A/PV/12, p. 32.

(226) E/PC/T/A/PV/12, p. 43, per Dr Holloway quoting from the report of the Sub-Committee in document T/139, para 5.

(227) Verbatim Report of Thirty Third meeting of Commission "B", 19 August 1947, of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/B/PV/33, 19 August 1947, at p. 42. Note that a longer passage including the passage quoted is recorded in Hudec (1990) at p. 42.

Dr Holloway agreed to leave the matter at that on the basis that the drafting committee's statement was included in the Geneva report of the Preparatory Committee and, indeed, it was ⁽²²⁸⁾. This final attachment to the report of the Geneva meeting substantially undermines any interpretation of the Geneva preparatory records as representing a common understanding as to the intention of Article 89.

The Geneva Report did not contain a draft of the GATT. This was dealt with as a separate undertaking by a Tariff Agreement Committee. After the issue of the Geneva Report, bilateral tariff negotiations continued for two months. By the end of that time, a text of the GATT had been agreed. Jackson notes that the Tariff Agreement Committee did not reopen the negotiations over wording contained in the clauses of the draft ITO Charter but merely considered whether clauses of the ITO Charter should be included in the GATT ⁽²²⁹⁾. Jackson also notes that "the committee members seemed agreed that only such articles as would normally be found in commercial treaties should be included in the GATT" ⁽²³⁰⁾. Article 89 of the Geneva draft ITO Charter was reproduced in Article XXIII of the GATT with the word 'Charter' in Article 89 being changed to 'Agreement' in Article XXIII.

The review of the preparatory work is useful for a number of reasons:

(i) it indicates that the authorization of suspension of obligations in response to non-violations was not grounded in any histori-

(228) "Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment", E/PC/T/186, 10 September 1947 (Geneva Report') (UN Publication sales no 1947.II.4) Note to Chapter VIII at p. 53. The note provides:

"The Preparatory Committee points out that a limited time has been devoted to the study of the means of providing for interpretation of the Charter and for settlement of differences among Members and between Members and the Organization. Therefore the Preparatory Committee recommends that this subject should receive early and full re-examination by the World Trade Conference and the drafts contained in this Report have been prepared on the assumption that this course will be followed."

(229) Jackson (1969) p. 44 citing UN Doc EPCT/TAC/PV.7 at p. 3 (1947).

(230) Jackson (1969) p44 citing UN Doc EPCT/TAC/PV.6, at p. 8 & EPCT/TAC/PV.10, at 15 (1947).

cal precedent but that the wording was borrowed from treaties in which they had been used as a criteria for requiring consultations only;

(ii) that it was acknowledged that the provision would have to be interpreted over time;

(iii) it was acknowledged that some restraint should be exercised in interpreting the clause to ensure that it did not result in extension of the rules into matters that should be within the field of domestic sovereignty; and

(iv) the preparatory work confirms that a literal interpretation of Article XXIII of the GATT is untenable.

The more difficult question is whether the preparatory work indicates whether nullification or impairment should be restricted to benefits under tariff concessions. On the breadth of the meaning of benefit, it appears that the arguments for a broad interpretation were based on the assumption of a fixed exchange rate world and upon assumptions about the role of trade restrictions in correcting macroeconomic problems which might not have much support today ⁽²³¹⁾. In addition, the preparatory work does not clearly indicate whether the arguments for a wide reading of benefit were intended to be applicable to Chapter V standing alone from the rest of the draft charter. Some weight can be placed on the report of the London session to support the argument that the participants understood that, with the clause referring only to 'benefits' under the chapter, it would not give a right to suspend in the two situations listed in the London report which related to measures affecting consumer demand and measures affecting general competitive conditions. It was argued that this would confirm an interpretation of

(231) See BERGSTEN, C. Fred, *Reforming the GATT - The Use of Trade Measures for Balance of Payments Purposes* (1977) 7 *Journal of International Economics* 1-18 at 3; EGLIN, Richard, *Surveillance of Balance of Payments Measures in the GATT* (1987) 10 *World Economy* 1-26 at 2; FRANK, Isiaiah, *Import Quotas, the Balance of Payments and the GATT* (1987) 10 *World Economy* 307-317 especially at 313-314; and ROESSLER, Freider, *The Relationship Between the World Trade Order and the International Monetary system* in Ernst-Ulrich PETERSMANN & Meinhard HILF, *The New GATT Round of Multilateral Trade Negotiations* (Studies in Transnational Economic Law, Vol 5) (Kluwer, Deventer, 2nd ed, 1991) pp. 363-386 at 375-377.

Article XXIII as not applying to measures which simply depress consumer demand or to measures which might be characterized as non-specific regulatory subsidies. This argument would be supported by the signs that there was not even unanimous support for the extension of the broader form of the clause which referred to "Charter" instead of "Chapter" to these two situations listed in the London report. The non-application of Article XXIII to measures which simply depress consumer demand is also supported by the agreement by the two leading protagonists in the debate that merely having high tariffs would not constitute the impairment of a benefit. This narrow interpretation of the word benefit is also reinforced by the fact that when the GATT was drawn from Chapter V of the draft ITO charter, the parties intended to carry over from the charter only those articles which were normally found in commercial treaties and the content of those articles was not redebated. This indicates an intention that the word 'benefit' should have the same meaning as it would have had in a simpler tariff agreement.

8.2. *Preparatory Work in the Uruguay Round.*

The practice of the CONTRACTING PARTIES prior to the Uruguay Round indicates that at the beginning of the Uruguay Round, there was no consensus as to the proper scope of non-violation complaints. The CONTRACTING PARTIES had not adopted a panel report containing a decision on the basis of non-violation nullification or impairment since the two cases in the 1950's and, during the 1980's, the EEC had prevented adoption of two panel reports containing findings based on non-violation or impairment. In the Uruguay Round, the question of non-violation complaints affected a range of matters being dealt with under the negotiation and had to be dealt with in a number of the subcommittees dealing with specific parts of the negotiation ⁽²³²⁾. The subcommittee on Dispute Settlement most directly considered non-

(232) The Punta Del Esta Ministerial Declaration on the Uruguay Round of 20 September 1986 (GATT, BISD 33S/19) established a Trade Negotiations Committee which oversaw work of a Group on negotiations on Goods, a Group on Negotiations on Services and a Standstill Surveillance Body. The Group on Nego-

violation complaints. The negotiating groups on Services and TRIPS also had to consider whether non-violation complaints would be permissible in those fields. The Subsidies group had to consider how non-violation complaints might be made against non-violation subsidies and the negotiating group on agriculture had to consider whether agricultural subsidies would still be exposed to non-violation complaints. There can be little doubt that the negotiation on agriculture had some bearing on the negotiation over the non-violation clause. The EEC must have been appreciated that wholesale changes to the CAP with new disciplines on import barriers and export subsidies might only be politically feasible if domestic subsidies were maintained. It would be fundamental for the EEC to ensure that its domestic subsidies could not be challenged under the non-violation provisions.

8.2.1. *Preparatory Work on the Dispute Settlement Understanding and on the GATT.*

It was not until September 1989, when the Oilseeds dispute was under way, that the Dispute Settlement Group reviewed non-violation complaints and some submissions were made for a clarification and reformulation of the rules for non-violation complaints ⁽²³³⁾. Stewart records:

“One representative noted that non-violation complaints tended to be more complex [than violation complaints], and therefore, warranted further discussion outside the context of the Round. Another representative [the EC] expressed his reluctance to tinker with non-violation complaint procedures as the legalistic concepts involved (eg., good faith, reasonable or legitimate expectations, and estoppel) were clearly developed in other areas, alle-

tations on Good created 14 sub-committees for specific subject matter (see the decision dated 28 January 1987 in GATT BISD 33S/31).

(233) STEWART, Terence P. (ed), *The GATT Uruguay Round - A Negotiating History (1986-1992)* (Kluwer law and Taxation Publishers, Deventer & Boston, 1993) Volume I at pp. 2771-2772. Stewart cites the records of “Meeting of 28 September 1989, Note by the Secretariat”, GATT Doc NO MTN.GNG/NG13/16 (13 November 1989) pp. 2-5.

viating the need to address these concepts in the context of the negotiations" (234).

It seems that there were some parties who wished to avoid doing anything to change the status quo on non-violation complaints and others who wished to codify the criteria set out in the 1950's cases. One thing is clear. The parties did not have any common concept of either the theoretical underpinnings of non-violation complaints nor of their appropriate scope. The parties did not agree on whether non-violation complaints should be restricted to impairment of benefits under tariff concessions or should apply to other benefits nor on whether it should be necessary to demonstrate adverse trade effects or merely an adverse change to competitive conditions. There was also disagreement about whether non-violation complaints should follow a different procedure. In particular, the EEC proposed that the positive consensus rule should continue to apply to adoption of non-violation decisions (235).

In October 1990, when the Chairman of the negotiating group on Dispute Settlement produced a draft text, the entire section on non-violation was bracketed to indicate different views. In December 1990, when the Secretariat prepared the Draft Final Act for the Brussels Ministerial meeting, the dispute settlement text had been changed but still indicated different views. It contained two options:

"Option a: The general dispute settlement procedures shall apply, subject to the following qualifications, in the case of complaints that a [reasonable] [legitimate] expectation by a complaining party in respect of a benefit accruing to it through the operation of a market access concession [or other commitment] [, other obligation] [or derogation [under Article XXV] therefrom], has been frustrated by the introduction or intensification of a measure, not in conflict with the General Agreement, [upsetting the conditions of competition] [having an adverse effect on trade], and thereby nullifying or impairing a GATT benefit.

Option b: Without prejudice to the scope of Articles XXII and

(234) Stewart (1993, see fn234 above) at pp. 2771-2772. In relation to the EC suggestion, Stewart cites "Statement by the Spokesman of the European Community at the Meeting of 5-6 April 1990", GATT Doc No MTN.GNG/NG13/W/39 (5 April 1990) at p. 2.

(235) Stewart, p. 2772.

XXIII of the General Agreement, the general dispute settlement procedures shall apply, [including panel and appellate procedures], [except that binding arbitration should replace panel and appellate procedures] in the case of complaints that a legitimate expectation by a complaining party in respect of a benefit accruing to it through the operation of a market access concession [or other commitment] [, other obligation, or derogation [under Article XXV] therefrom,] has been frustrated by the unforeseeable introduction or intensification of a measure, not in conflict with the General Agreement, [upsetting the conditions of competition] [having an adverse effect on trade], and thereby nullifying or impairing a GATT benefit" (236).

There were also proposals on procedure. The text omitted any confirmation that the power to authorize retaliation could be exercised in non-violation cases.

After the breakdown of the Brussels meeting, little progress was made on the text until October 1991 when the chairman of the Negotiating Group on Dispute Settlement released a revised text which contained the following clause:

"The procedures in this Understanding shall apply ..., where a party has recourse to dispute settlement based upon Article XXIII:1(b) alleging that the introduction or intensification of a measure not in conflict with the General Agreement, and which could not reasonably have been foreseen, frustrates a [legitimate expectation of a benefit accruing to the party under market access concessions or other commitments under the General Agreement] [REASONABLE EXPECTATIONS OF A BENEFIT ACCRUING TO THE PARTY DIRECTLY OR INDIRECTLY UNDER THE GENERAL AGREEMENT], upsetting the conditions of competition [and] [OR] having an [ACTUAL OR POTENTIAL] adverse effect on trade" (237).

(236) The Brussels, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations GATT Doc No MTN.TNC/W/35/Rev.1 (3 December 1990) ('Brussels Draft Final Act'). It is reproduced in Stewart, *The GATT Uruguay Round*, in Volume III: Documents at pp. 65-455 and the articles quoted are at p. 366.

(237) Stewart, at p2791 quoting from "Understanding on Rules and Procedures Governing the Settlement of Disputes under Article XXII and XXIII of the General Agreement on Tariffs and Trade" (23 October 1992) (Revised Brussels Draft Understanding') at pp. 14-15. At p. 2791, fn895, Stewart, (citing p. 15 of the text) notes "The revised text indicated that lower case bracketed language was to be read together and vice-versa for upper case bracketed language."

Two months later, when Director-General Arthur Dunkel presented the "Dunkel Text" of the Draft Final Act of the Uruguay Round, the above clause had been replaced with a new clause which is almost identical to the one which was adopted in the final WTO Agreement ⁽²³⁸⁾. This clause discarded any attempt to codify the law or to resolve any of the contentious issues surrounding non-violation complaints. It merely paraphrased the words of Article XXIII, required a detailed justification of non-violation claims and confirmed that a party could not be required to remove a non-violation measure. It did not codify any criteria for non-violation complaints. It merely preserved the status quo without having any impact at all on the arguments relating to the criteria for non-violation complaints. It indicated nothing whatsoever about: (i) whether complaints are restricted to benefits under tariff concessions; (ii) whether a breach of expectations is necessary and how this is determined; or (iii) whether an upset to competitive conditions is sufficient or whether some actual adverse trade effects are necessary. However, the status quo had not been perfectly preserved because the non-violation provision subjected such complaints to the general rules of the DSU having the effect that the negative consensus rule applied to adoption of reports and authorization of retaliation in non-violation cases.

At that stage of the negotiation, the question of nullification or impairment caused by non-violation subsidies had also arisen in the Negotiating Groups on Subsidies and on Agriculture. The draft SCM Agreement provided for non-violation nullification or impairment claims but limited them in the ways already described: effectively creating another class of prohibited subsidies being those specific subsidies above a *de minimis* level that caused serious prejudice in the form of actual trade effects; and excluding non-violation complaints from non-specific and other non-actionable subsidies. The Dunkel Text Agreement on Agriculture was silent as to whether non-violation nullification or impairment claims could

(238) "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" MTN.TNC/W/FA, 20 December 1991 ('Dunkel Text').

still apply to subsidies that were either subject to reduction commitments or were exempt from such commitments because they were not production distorting. In the concluding negotiations of the Uruguay Round, the peace clause was added to the Agriculture Agreement. This excluded non-violation claims from subsidies that conformed to the Agriculture Agreement for the period of the implementations period under that agreement. One effect of this was that the subsidies like those the subject of the ruling in the Oilseeds case could not be the subject of a non-violation nullification or impairment complaint in the future, at least until the end of the implementation period.

The Uruguay Round negotiation indicates that parties did not have any common understanding of the proper scope for non-violation complaints. They were unable to agree on any codification of the criteria necessary for these complaints. However, they were able to agree that non-violation nullification or impairment complaints should not be possible in respect of:

- (i) all non-specific subsidies;
- (ii) certain other non-actionable subsidies under the SCM Agreement;
- (iii) non-violation domestic subsidies on agricultural products not linked to production ;
- (iv) non-violation domestic subsidies on agricultural products that are linked to production but which conform to reduction commitments; or
- (v) non-violation domestic subsidies on agricultural products which are linked to production, are not subject to reduction commitments but are less than 5% of the value of the product (for developing countries the de minimis percentage is 10%).

The parties also excluded export subsidies conforming to reduction commitments from the new rules in the SCM Agreement relating to serious prejudice. All of these types of subsidies were also given immunity from countervailing duties. The creation of these immunities does not derogate from the general indication that the parties still had no common understanding of what was meant by non-violation nullification or impairment and that they were not in agreement on the criteria based on the two 1950's cases.

8.2.2. *Preparatory Work Relating to the GATS.*

The drafts of Article XXIII:3 which appear in the 1990 Brussels draft Final Act and in the 1991 Dunkel Text draft Final Act are fairly similar to the final version of that Article. The 1990 draft provides for a draft of Article XXIII:4 as a "text for discussion":

"If any Party considers that any benefit it could reasonably have expected to accrue to it under a commitment assumed by another Party in its Schedule of Commitments is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may resort to the procedures of Article XXII and XXIII, paragraphs 1 and 2. If the commitment is determined by the PARTIES to have been nullified or impaired and the measures is not withdrawn, the commitment shall be deemed to have been modified or withdrawn and paragraphs 2 and 3 of Article XXI [on modification of schedule commitments] shall apply".

This draft (like all that followed it) restricted non-violation claims to the nullification or impairment of benefits that a Member could reasonably expect to accrue under a Scheduled Commitment. The connection with Article XXI is strong, for the resort to retaliation under a non-violation complaint, once a finding of nullification or impairment has been made, would be exactly the same as under Article XXI. This indicates a conception of the non-violation complaint as a remedy in case of circumvention of Article XXI. The reference to withdrawing the measure must have been interpreted by some as implying an obligation to remove non-violation measures. It was removed in the 1991 draft the first part of which is identical to the 1990 draft but which ends as follows:

"If the commitment is determined by the PARTIES to have been nullified or impaired, the Party shall be entitled to a mutually satisfactory adjustment on the basis of Article XXI, paragraph 2, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Parties concerned, Article XXIII, paragraph 3 shall apply."

The connection with Article XXI is retained but retaliation has been made subject to authorization in the same manner as in a violation case.

The drafting history of Article XXIII:3 of the GATS demonstrates, firstly, a reliance on notions of non-violation nullification or impairment deriving from the early GATT cases and, secondly, an intention that the clause should prevent circumvention of Article XXI.

9. *In the Light of its Object and Purpose.*

Before drawing some conclusions from the above analysis, it is necessary to give more consideration to the object and purpose of all of the treaties that bind Members of the WTO. The preambles to the GATT and to the WTO Agreement refer to making a contribution to the achievement of broad objectives. Both preambles say:

“Being desirous of contributing to these objects by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce” (239).

Indeed, the negotiating history of the GATT was dominated by these two objectives and, in the end, there was a trade-off between them. First, there was the objective of eliminating discrimination, largely motivated by the USA's desire to dismantle Commonwealth preferences. Secondly, there was the objective of reducing trade barriers and, for all of the participants other than the USA, the principal interest was access to the market of the USA (240). These purposes were manifested in the structure of the agreement as being based on country by country, product by product, exchanges of tariff concessions which were multilateralized by a most favoured nation clause. It is clear that removing or at least substantially reducing discrimination was essential to the agreement and that the most

(239) See the third paragraph of the preamble to GATT 1947 and the third paragraph to the Agreement Establishing the WTO.

(240) On the importance of these two factors and the linkage between them, see CULBERT, *Jay War-Time Anglo-American Talks and the Making of the GATT* (1987) 10 *The World Economy* 381-398 especially at 391-392; PENROSE, E.F., *Economic Planning for the Peace* (Princeton University Press, Princeton, 1953) pp. 92-93; BROWN, *The United States and the Restoration of World Trade* at p. 51.

favoured nation clause was fundamental to the obligations contained in the treaty. The continuing importance of the most favoured nation rule is indicated by its position as the only rule in the WTO Agreement which requires absolute unanimity for amendment ⁽²⁴¹⁾. Secondly, it is clear that the trade liberalization achieved was intended to last and that it was important to prevent exchanges of concessions from being unwound. The protection of the integrity and value of tariff concessions was fundamental to the agreement. Therefore, the non-violation provisions must be interpreted in a manner which is consistent with these two fundamental objects of the treaty: non-discrimination and protection of tariff concessions.

The twin objective of reducing discrimination and maintaining the balance of concessions are manifestations of an even more fundamental objective of the original GATT and of the WTO Agreement. This is that trade relations should be governed by rules of law rather than positions of relative power. The reason for the unconditional most favoured nation rule is that it prevents more powerful nations from negotiating more favourable treatment and it enables less powerful nations to receive the same treatment as more powerful nations. The MFN rule prevents trade liberalizations from being withdrawn from particular countries for unrelated political reasons. It means that once a certain level of economic interdependence is established then any individual Member cannot have the trade liberalization upon which that economic interdependence is founded unilaterally removed without having recourse to an adjustment of the balance of concessions. Interpretation of the non-violation provisions should not undermine this paramount purpose of the Treaty.

Certain things were outside the scope of the object and purpose of the negotiation of the GATT and must be regarded as outside the object and purpose of the treaty. It was not intended to achieve free trade, only to achieve the exchange of measured tariff reductions. It was not even desired that there should be reciprocity in the degree to which parties approached free trade. It was only desired that there be a first difference manner of reciprocity in the sense that the

(241) See WTO Agreement, Article 10(2).

reductions in protection that were exchanged should be reciprocal ⁽²⁴²⁾. Therefore, it is not necessary to interpret the non-violation provisions so as to create liberalization of trade that goes any further than the liberalizations that were exchanged in negotiation. Nor is it an object of the rules that Members should have the same level of tariffs or that competitive differences between Members should be eliminated. Therefore, the non-violation provisions should not be interpreted on a basis that penalizes Members for having a different level of protection from other Members or penalizes them because of aspects of their competitive position, that is, their comparative advantage.

Secondly, it was not intended that parties would be fettering their ability to manage aspects of their economies that were essentially domestic in nature except where such an obligation was incorporated into a schedule. This division between matters that are international in nature and domestic in nature is not simple. In fact, it is a constant problem in international law to try to distinguish between what is an appropriate subject matter for nations to be subjected to international rules and international political processes and what is an appropriate subject matter to be left to the domestic law and the domestic political process. Despite the difficulty of the distinction, it is clear that the parties were making such a distinction. The mere fact that the most favoured nation clause is 'unconditional' means that it is not possible to link most favoured nation treatment to any assessment of reciprocity or harmony between the domestic policies of states. It follows that some policies which might alter the comparative advantage of a member must be permissible without the consequence of risking retaliation.

The way that international consequences are brought to bear on domestic politics is a critical element in all of the WTO agreements. Sovereignty to make decisions on trade policy or any other matter is retained but certain international consequences must be considered. Any measure which violates one of the agreements, carries with it

(242) Note that Snape points out a some deviation from this position under the GATS: see SNAPE, *Reaching Effective Agreements Covering Services* in Anne O. KRUEGER (1998, see fn35) pp. 279-293 at p. 287.

the consequence that the Member must give compensation or run the risk of incurring retaliation. The GATT and the GATS serve domestic and international functions in this way. First, on an international plane, they facilitate a greater degree of economic interdependence which gives all Members the ability to exploit their comparative advantage and to do so in a stable environment. Secondly, on a domestic plane, the treaties provide a constraint on government decision making ⁽²⁴³⁾. Whilst it is recognized that some level of government intervention in the economy may be welfare improving, the GATT and the GATS play a role in steering governments away from the influence of lobby groups toward lower levels of protection and toward choice of less costly policy instruments so as to reduce both the dead weight losses from protection and the transfers from consumers to producers. This important function demands that the threat of retaliation should operate in a way that does steer governments in the direction indicated. It is consistent with this function that the GATT and GATS generally impose more constraints on some instruments than others ⁽²⁴⁴⁾. This aspect of

(243) For example, see FARBER, Daniel A & HUDEC, Robert E., *Free Trade and the Regulatory State A GATT's Eye View of the Dormant Commerce Clause* (1994) 47 *Vanderbilt LR* 1401-1440; ROESSLER, Frieder, *The Scope, Limits and Function of the GATT Legal System* (1985) 8(3) *The World Economy* 287-298 particularly at 298; ROESSLER, Frieder, *Discussion to Section IV: competition and Trade Policies. The Constitutional Function of International Economic Law, Ausseiwirtschaft* 41 Jahrgang (1986) Heft II/III, Grusch, Ruegger, S.467-474 particularly at 473; PETERSMANN, Ernst-Ulrich, *Constitutional Functions and Constitutional Problems of International Economic Law* (University Press, Fribourg, Switzerland, 1991) especially p. 83. TUMLIR, Jan, *GATT Rules and Community Law - A Comparison of Economic and Legal Functions* in Meinhard HILF, Francis G. JACOBS & Ernst-Ulrich PETERSMANN (eds), *The European Community and GATT* (Kluwer, Deventer, The Netherlands, 1986) pp. 1-22.

(244) See DUNKEL, Arthur, *Hierarchie Des Instruments De Politique Commerciale Dans Le Systeme Juridique Du GATT* in Guy Ladreit de Lacharriere et La *Politique juridique exterieure de la France* (Masson, Paris 1989) pp. 234-244 & ROESSLER, Frieder, "The Constitutional Function of the Multilateral Trade Order" in Ernst-Ulrich PETERSMANN (ed), *National Constitution and International Economic Law* (Studies in Transnational Economic Law series Volume 8) (Kluwer, Boston, 1993) pp. 53-62. See also the ranking of policies in PETERSMANN, Ernst-Ulrich, "International Competition Rules for Governments and for Private Business: A "Trade Law Approach" for Linking Trade and Competition Rules in the WTO" (1996) 72 *Chicago-Kent Law Review* 544-582, Table 3 at 552.

instrumentation may be relevant to delineating the proper scope of the non-violation provisions. For if retaliation can be authorized against every type of instrument, then not only will the capacity of the GATT and the GATS to guide Members towards the adoption of least costly measures be impaired but, in addition, the ability of a Member government to achieve a particular welfare enhancing policy objective will be inhibited.

Perhaps a closer analysis of the effects of different instruments will be relevant. We noted above (in Section 2) that tariff concessions create a situation in which competition can occur on the basis of price. The withdrawal of that tariff concession would result in the creation of a larger gap between the world price and the domestic price to both consumers and producers. We also noted above in the analysis of the text in its context that the various prohibitions in the agreement directed at protecting the value of concessions have the effect of preventing the creation of or widening of any gap between both the world price and the domestic price for consumers and the world price and the domestic price for producers. Where a tariff binding establishes a gap of a particular size to operate between the world price and the domestic price to consumers and producers, then subject to that agreed gap, competition should be able to occur on the basis of price. Competition on the basis of price means that domestic producers cannot increase their own prices without the threat of increased imports. Therefore, any measure which enabled the domestic producers to increase their own price by more than the agreed gap over world prices without exposing them to increased imports would be a change of competitive conditions which would reverse, at least partially, both of the market effects of a tariff concession. Perhaps, this is a useful criteria for deciding whether nullification or impairment exists. Under the GATS, this criteria might be appropriate in relation to those specific commitments which do have effects on both the gap between the world price and the consumer price and that between the world price and the producer price. One must consider whether this criteria should be a 'necessary' condition or a 'sufficient' condition? Further consideration of price effects is warranted.

The question arises whether the maintenance of competition on

the basis of price subject to a negotiated margin should not only be regarded as meaning that domestic producers cannot increase their own prices without the threat of increased imports but should also be regarded as meaning that it must be possible for foreign suppliers to increase sales by reducing their price. In more general terms this is a question of whether we should regard it as an object of the agreement to prevent measures on bound goods or scheduled services which either

(i) change the gap between the world price and domestic price to producers without changing the gap between the world price and the domestic price to consumers — this is the result of a domestic production subsidy; or

(ii) change the gap between the world price and the domestic price to consumers without changing the gap between the world price and the domestic price to producers — this is the effect of a consumption tax;

or whether we should regard these as unregulated.

It is clear that neither the GATT nor the GATS directly regulate the level of consumption taxes or subsidies. This accords with the fact that there may be situations in which the community is made better off if the quantity of consumption of a particular product or service is reduced because there are certain costs of that product or service which are not incorporated in the price or increased because there are benefits which are not incorporated into the price. Consumption taxes or subsidies create a gap or change the gap between the world price and the price to domestic consumers but they do not create a gap or change the gap between the world price and the price to domestic producers. Therefore, they have an impact on the overall level of consumption but do not change the conditions of competition on the basis of price between foreign and domestic producers of the same product. Application of the non-violation nullification or impairment principle to non-violation consumption taxes or subsidies might impair the capacity of Members to adopt welfare enhancing measures without risking the consequence of retaliation. Such a view might place the situation in the Ammonium Sulphate case outside the scope of non-violation nullification or impairment but consideration should be given to whether that kind

of situation might be better regarded as a bad faith application of the national treatment rules.

Consider domestic production subsidies. There may be situations in which the community is better off if the quantity of production of a particular product or service is increased because there are certain benefits from the provision of that product or service which are not incorporated into the price. In this situation, the subsidy does not create a gap between the world price and the domestic price to consumers but does create a gap between the world price and the domestic price to producers. The domestic producer is not placed in a position of being able to increase price without the fear of increased foreign supplies but the negotiated gap between world prices and domestic producer prices is being narrowed and the capacity of the foreign supplier to gain sales by reducing price is impaired. The authorization of retaliation in this situation might impose a disincentive to adopt a welfare increasing measure using the lowest cost instrument. However, excluding the non-violation provisions from all subsidies for production would not assist to create an incentive, in situations where the market failure is not related to the level of production but to some other factor related to inputs, to use a subsidy that is more directly applied to the source of the market failure. This is precisely the problem that arose in the Canned Fruits and Oilseeds cases, where the desired end was not more production or even more domestic production but was the utilization of more domestic inputs. Excluding the non-violation principle from those situations would have removed any incentive to pay the subsidy for using domestic inputs (like land or labour) instead of paying the subsidy on the basis of production. However, it is not clear that the way that the non-violation principles were applied in those cases would ensure that the principles could not be used to authorize retaliation in circumstances where a subsidy was being used in the first best way to increase welfare. Such distinctions between subsidies were the subject of the negotiation which created the SCM Agreement and the Agriculture Agreement and as a result of those Agreements the need to consider these distinctions no longer arises under Article XXIII:1(b). Clearly the parties preferred that such matters be the subject of specific rules in those Agree-

ments instead of them being regulated by the application of Article XXIII:1(b).

The non-violation nullification or impairment provisions of the TRIPS would also have to be applied in a manner that accords with the objects and purposes of the TRIPS. The TRIPS also serves functions on an international and a domestic plane. On an international plane, it protects both the market access and price level of goods exported to or manufactured in a foreign market. On a domestic plane, it impacts on the overall efficiency of the economy and on the transfers of resources within the economy. It is more difficult in the case of intellectual property regulation than in the case of protection of domestic producers of goods or services to ascertain the existence of deadweight losses and of the transfers inherent in changes in the level of protection. In the case of intellectual property, since positive and negative effects occur at different points in time, then a determination of whether a net loss or gain occurs requires some method of estimating the future effects and calculating the present value of them. In the short term, transfers are from consumers to owners of intellectual property. Theoretically, this transfer is sufficient to provide adequate incentives to the owners to produce the subject of the intellectual property in the first place. In the longer term, consumers benefit from the existence of the invention and from other inventions that may flow from it. Whether the consumers lose or gain depends on a comparison of different costs and benefits at different points in time: whether the present value of the price increase paid in the short term due to the intellectual property law is larger than the present value of the benefits received from the invention and from derivative inventions in the future. Whether a particular level of intellectual property is welfare enhancing depends on the size of the transfers and on the rate of discount used to calculate their present value. The rate of discount depends upon the opportunity costs to particular communities. Therefore, it cannot be said that any particular level of intellectual property will be welfare enhancing for any particular WTO Member. This means that the same increase in intellectual property protection might be welfare increasing for one WTO Member but might be welfare decreasing for another. It also means

that, for every WTO Member, as incremental increases in intellectual property protection are made, there must come a point where a further increase in protection is welfare decreasing (unless the community has an unlimited preference for transfers from consumers to intellectual property owners). Therefore, assuming that the purpose of the TRIPS is not to diminish welfare, it must be that infinite protection of intellectual property is not an objective of the TRIPS.

This conclusion seems rather trite but if we consider what the purpose of non-violation complaints under TRIPS might be, it becomes important. It is necessary to decide what is meant by nullification or impairment of a benefit accruing under the TRIPS which in turn required definition of a benefit under the TRIPS. If infinite protection of intellectual property is not an objective of the TRIPS, then it cannot be said that the TRIPS confers general benefits to higher prices and longer protection. The benefits must be tied precisely to the protection which is required under the Agreement. This would mean that there is no scope at all for non-violation complaints under the TRIPS.

10. *Summary.*

This paper set out to delineate the proper scope of non-violation complaints in the WTO system and, in doing so, to serve both the need to give effect to the objects and purposes of the system and to provide adequate certainty in the operation of the treaties.

We saw that the problem of non-violation nullification or impairment arose from the peculiar dispute resolution clause that was adopted in the GATT 1947. The clumsiness of that dispute settlement clause has caused some problems not only in non-violation cases but also in violation cases as a result of which these criteria have been effectively removed from violation cases. It was observed that the words of the non-violation provisions are capable of a broad construction which could justify suspension of obligations in response to non-violation measures (or even omissions) relating to various domestic policies that are not expressly subject to regulation under the WTO Agreement. However, the clearest thing that

emerges from this analysis is that a literal interpretation of the non-violation provisions outside of their context and object and purpose is completely untenable. Any attempt to place a literal meaning on the words for the raw advancement of objectives of market access or intellectual property protection without consideration of their context and object and purpose is misguided. This view is supported by the analysis of the context of the rest of the provisions of the treaties, by the objects and purposes and by the practice of the parties and is confirmed by the preparatory work.

It was noted that the non-violation clause as a catch-all clause is only one of a number of ways to protect obligations under a tariff treaty and that the determination of the scope of the non-violation nullification or impairment clause is the complement of the determination of the scope of situations in which a Member must be able to point to a specific entry in a schedule in order to be able to suspend their obligations. A review of the practice of the parties indicates that the parties have been careful to limit the scope of non-violation nullification or impairment, there being several examples of reluctance to permit extensions of the concept, and only three decisions in dispute settlement that were based on non-violation nullification or impairment. The two early decisions contained very unusual facts: one might be regarded as a case of bad faith and the other as a wrong decision. No other finding of non-violation nullification or impairment was adopted until the Oilseeds decision in 1989. That decision was carefully narrowed by a finding of fact that the subsidy under consideration prevented the tariff binding from having any impact on the competitive relationship between domestic and imported products. The decision restricted its decision to product specific subsidies thereby conforming its reasoning to the rationale of specificity being adopted in the Uruguay Round negotiation of the SCM Agreement and to the rationale of product-linkage being adopted in the negotiation of the Agriculture Agreement. The follow-up report broadened its reasoning, or more correctly, its interpretation of the reasoning of the original panel report by regarding the original finding as based upon the view that a party would not reasonably expect that the price effect of a tariff concession would be systematically offset but was

still limited by its finding of fact that the price effect of the concession was being systematically offset. The authority of this limited broadening in the follow-up report is substantially undermined by the fact that the follow-up report was never adopted.

The context of the provisions and the practice of the parties indicate that non-violation complaints would be regarded as exceptional. For the GATT and the GATS, the *general rule is that where a party wishes to have an escape clause additional to those in the treaty then the onus is on that party to negotiate such an escape clause in the schedules*. The CONTRACTING PARTIES to the GATT only accepted exceptions in four situations:

(i) where there was a violation quota the illegality of which had been waived in a decision which specifically reserved the right of others to retaliate;

(ii) where the removal of a consumption subsidy had exactly the same protective effect as the discriminatory imposition of a consumption tax;

(iii) where a tariff rate was in breach of another agreement to maintain no less favourable treatment for a particular product;

(iv) where a subsidy virtually eliminated the ability of foreign producers to be able to compete on the basis of price.

Now the fourth of these exceptions is limited to non-agricultural products at least until the year 2004.

Despite the reluctance of the parties to apply a broad principle of non-violation nullification or impairment, there are some elements that have been repeated several times by dispute settlement panels:

(i) the principle that whatever was reasonably expected at the time of a tariff concession must be regarded as forming part of the balance of concessions and that Article XXIII:1(b) cannot be used to authorize suspension in response to the effects of a measure that is part of the original balance of concessions.

(ii) (regardless of the uncertainty relating to proof of trade effects), the principle that nullification or impairment requires an adverse change to the conditions of competition between the domestic supplies of the bound product and foreign supplies either of

a like product or a directly competitive product that are established by the relevant 'benefit under the Agreement'.

It is implicit in the first of these principles that there must be a tariff concession and it is submitted that the principle of non-violation nullification or impairment of benefits under the GATT is restricted to benefits under negotiated commitments. The corresponding position is explicit in the GATS. In the GATT, consideration of the various provisions which underline the fundamental importance of maintaining the balance of concessions and of the other provisions which provide for renegotiation or escape from obligations indicates that Article XXIII:1(b) is intended to function as a catch-all clause to cover any form of circumvention of tariff concessions that would not be caught by the specific prohibitions that are directed to particular ways that tariff concessions might be circumvented. In some instances, mechanisms to avoid the provisions of particular prohibitions could be regarded as bad faith in the carrying out the obligation under the prohibition. Such instances are covered by Article XXIII:1(a). In instances involving a product on which a party has not given a tariff concession, there is nothing to prevent the party from increasing the tariff to whatever level of protection was desired. There would be no state of competitive conditions to be protected. This limitation to benefits under tariff concessions is consistent with all of the adopted decisions in which the principle has been applied. That it is the ordinary meaning of the words is confirmed by the preparatory work for the GATT which only carried over from the draft ITO charter into the GATT those provisions which related to tariff concessions and by the preparatory work for the ITO charter which shows the perception that, in order to apply the words to other matters, the word 'chapter' had to be changed to 'Charter'. Therefore, it is submitted that the dicta in the case relating to US Restrictions under the Headnote suggesting that non-violation complaints could relate to other types of benefits is wrong ⁽²⁴⁵⁾.

(245) This position is in accord with the view expressed in Petersmann (1997, see fn108 above) at 172 but is narrower than the possibilities suggested by VON BOGDANDY, Armin, "The Non-violation Procedure of Article XXIII:2, GATT"

The Citrus case raised the question of whether the nullification or impairment principle should protect the benefits which accrue under the most favoured nation rule in Article I. Deviations from Article I are not violations if they conform to an exception including Article XXIV. The question that arose in the Citrus case is essentially one of whether the rebalancing process in Article XXIV is intended to exclude any subsequent challenges under benefits under tariff concessions. The rebalancing process under Article XXIV gives compensation for the extent to which protection on particular products is raised. In doing so, it compensates for the detriment to the competitive position of any other party in relation to the home country. The Article XXIV process does not offer compensation for the extent to which the preferences detract from the competitive position of another party in relation to third parties who are also members of the free trade area. It is submitted that Article XXIV is intended to cover the field of all the appropriate rebalancing required to put a free trade area into place. Therefore, it is submitted that the CONTRACTING PARTIES correctly declined to adopt the Citrus Report.

The limitation of these complaints to benefits under tariff bindings does not imply that non-violation complaints can only be taken by those having an initial negotiating right in the relevant binding. This issue must be considered in the context of the central importance of the most favoured nation clause to the Agreement. Under the most favoured nation clause, every party is entitled to a benefit under every tariff concession given by every other party and that benefit cannot be taken away except through the renegotiation provisions and other escape clauses in the Agreement. Therefore, the non-violation nullification or impairment provisions protect benefits received by each and every party from each and every tariff concession regardless of who has initial negotiating rights. This view is consistent with the part of the Canned Peaches decision which all parties including the EEC were prepared to adopt. It is also consistent with the way that the concept of reasonable expectations has

(1992) 26(4) *JWT* 95-111 at 100, by Taylor (1997, see fn16 above) at 283; and by Tietje (see fn18 above) at 155-158.

been used and is relevant to determining what is embraced by the concept of reasonable expectations and how it should be used.

The theoretical basis for the concept of reasonable expectations has not been made explicitly clear in the treaties or in the practice of the parties. The clearest formulation is in the GATS but even there, uncertainties arise. However, it necessarily flows from the linkage of the concept of nullification or impairment to the giving of negotiated commitments that there must be a consideration of what benefit is to be regarded as flowing from any given tariff concession and the fundamental importance of the balance of concessions in the entirety of the agreement necessarily implies that matters that have been taken into account in the course of the negotiation are not to be grounds for the subsequent unwinding of obligations. The practice of the parties has not explicitly clarified whether we should be concerned with the reasonable expectations actually held or which were objectively reasonable, nor whether we are concerned with reasonable expectations of particular parties or of all of the parties to the treaties. It is of paramount importance that this is a multilateral treaty under which all benefits are accorded unconditionally to every party including parties who were parties at the time but did not actually participate in the negotiation of particular obligations and even to parties who were not parties at the time that particular obligations came into effect. It is submitted that the WTO should treat reasonable expectations as an element that arises out of the law of treaties. Determining reasonable expectations is an aspect of determining the common intention of the parties in good faith. It is submitted that the previous decisions should be regarded as having been made upon the basis of what would have been objectively reasonable for any party to the Agreement to have expected from the negotiation of a particular tariff concession regardless of which parties actively negotiated the particular concession ⁽²⁴⁶⁾. This interpretation is consistent with the approach in the Oilseeds case under which the US was deemed to have expected those subsidies

(246) Cf Petersmann (1997, see fn108 above) at 172 which places emphasis on the expectation of the particular party to whom the binding given.

which were paid under laws existing at the time of the tariff negotiation.

If reasonable expectations are treated on this basis, then it would be extraordinary for any measure in existence and published at the time of negotiation of a tariff concession or specific commitment to be regarded as being outside of reasonable expectations ⁽²⁴⁷⁾. Generally, it would be objectively reasonable for each party to the agreement to have expected that an existing and published measure with respect to a product or service had been taken into account in the giving of a negotiated commitment upon that product or service. Situations in which measures are in effect but not yet published might be different.

Consideration was also given to the function of the WTO treaties in bringing international economic consequences into play so as to guide domestic decision making toward less protection and toward choice of least costly instruments of protection. It was noted that the benefit given by a tariff concession is that a margin is established between both the world price and the 'domestic consumers' price and between the world price and the 'domestic producers' price but that subject to that margin domestic producers must compete with foreign suppliers on the basis of price. It was argued that it was an objective of the rules to provide a disincentive to the adoption of measures which upset both of those margins and that such measures should be regarded as impairing tariff concessions or specific commitments. Consideration was then given to whether the rules have the object of discouraging measures which upset only one of those two margins. It was argued that if only the margin between world and domestic consumer prices is affected, then the relevant measure should not be regarded as impairing a tariff concession. Such measures do not impact on the conditions of competition between foreign and domestic producers. Next, it was argued that if the measure only affects the margin between the world price and the domestic producer price as a domestic subsidy does,

(247) This accords with the view expressed in Petersmann (1997, see fn108 above) at 172 but deliberately excludes subsequent effects of pre-existing measures: see Hindley (see fn17 above) at 35.

then it might be appropriate to regard that as nullification or impairment but that a general application to all such measures might impair the capacity of the agreement to guide parties towards the first best instrument for the policy objective.

Prior to the Uruguay Round, there had been some support for a general principle that domestic subsidies on products subject to tariff bindings could be regarded as impairing the benefit accruing under those tariff bindings. This was supported by the decisions of the parties in 1955 and 1961. However, the principle embodied in those decisions was only ever adopted in a narrow way in the reports in the Canned Fruit and Oilseeds decisions: the first limiting the scope of the impairment to the extent to which the subsidy went beyond compensating for higher internal prices and the latter limiting the scope of the impairment by reference to the fact that the subsidy made it practically impossible for foreign suppliers to increase sales by reducing price. The application of the nullification or impairment principle to non-violation subsidies is now excluded from subsidies that are non-actionable under the SCM Agreement, and excluded from agricultural products until 2004. The question remains as to whether and how the principle would be applied to a non-violation financial subsidy that is paid per unit of output of a non-agricultural product, or otherwise paid on a non-agricultural product in a manner which satisfies the specificity test. Previous decisions have set a precedent for application of the rule to such subsidies if they make it practically impossible for foreign suppliers to increase sales by reducing price. It is uncertain whether future legal decisions would display the same reluctance as shown in the Canned Fruit and Oilseeds cases to apply the principle to non-violation subsidies which only partially offset the effect of a tariff binding on reducing the gap between the world price and the price received by producers. In practice, the question will probably not arise because of the alternative track for remedies created under the SCM Agreement: the serious prejudice track. This will apply unless an absence of actual trade effects can be established. In practice, the rules set out in the 1955 and 1961 decisions have been displaced by the Uruguay Round rules on serious prejudice. Given that the distinction between subsidies that are first best and subsidies that

are *n*th best has been dealt with under more particular rules in the SCM Agreement and the Agriculture Agreement, then guidance towards the first best subsidy no longer need to be within the functions of the non-violation provisions. In summary, there is no further practical need for the concept of non-violation nullification or impairment as a discipline on subsidies. Consideration should be given to amending the text to reflect the practical situation.

If the discipline of subsidies is no longer one of the objects of the non-violation provisions, then there is no reason not to limit the application of the non-violation provisions to instruments which work against the effect of the tariff concession by impacting on both the gap between the world price and the consumer price and the gap between the world price and the producer price. This would give effect to the purpose of the Agreement as guiding parties toward achieving their policy instruments by the least restrictive instrument but not preventing them from achieving their policy objectives at all. It would be consistent with the approach and consistent with the interpretation of the specific provisions of the SCM Agreement that regulatory subsidies not be regarded as causing a nullification or impairment of a tariff unless the absence of tighter regulation could be regarded as undermining the effects of the tariff concession on both the gap between the world price and the consumer price and the gap between the world price and the producer price. Even in the absence of this consideration of the purpose of the Agreement, it was argued that the interpretation of the SCM Agreement indicates that non-violation complaints should not be available in the case of non-specific regulatory subsidies even if they could be available in the case of specific regulatory subsidies. This proposed limitation on non-violation complaints would also be useful in the context of the GATS. However, some complication of the suggested rule might be desirable in respect of any specific commitments under GATS which do not have effects on both consumer prices and domestic prices.

The interpretation of the provisions in their context has also indicated that the concept of non-violation nullification or impairment does not apply to measures in conformity with most of the specific exceptions in the Agreement. The analysis of the dispute provisions in their context indicates that non-violation nullification

or impairment does not apply to measures that are consistent with the exceptions for balance of payments restrictions, safeguards, and anti-dumping. It also indicates that the same is true of measures conforming to the particular agreements which govern the interpretation of those exceptions and supplement them. This paper has not considered all of the agreements but has indicated that non-violation nullification or impairment does not apply to measures conforming with the Balance of Payments Agreement, the SCM Agreement, the Safeguards Agreement and the ADA Agreement. The waiver seems to be a special case because, in giving the waiver decision, the WTO can decide whatever it wishes including whether to exclude the application of Article XXIII from matters complying with the waiver. However, apart from the waiver exception, there appears to be a general intention that measures justified under exceptions should not be exposed to retaliation under non-violation claims. It is submitted that the same approach should be taken to measures which comply with any of the specialized agreements including the SPS Agreement and the TBT Agreement ⁽²⁴⁸⁾.

The extension of non-violation nullification or impairment to matters traditionally regarded as non-trade should be regarded with caution and in accordance with the general rule that parties wishing to have an escape clause additional to those in the treaty then the onus is on them to negotiate an additional escape clause. This is consistent with the importance of the most favoured nation clause. This is consistent with the importance of the most favoured nation clause and, in particular, with the fact that the giving of most favoured nation treatment must be unconditional. Matters relating to the comparative advantage of a nation cannot be incorporated into conditions for the extension of most favoured nation status. The exclusion of domestic policy from the scope of the non-violation clause is also confirmed by the preparatory work including in statements by the proponents and statements by the opponents of the non-violation clause. Therefore, it is proposed that such mea-

(248) This accords with the view taken by Kuyper (1994, see fn66 above) at 249 but is narrower than the view taken by Von Bogdandy (1992, see fn245 above) at 107.

asures should only be regarded as impairing negotiated commitments on a product where the measures would not have been reasonably expected by a party taking reasonable steps to become acquainted with existing measures and where the measure counteracts the effect of the concession on both producer prices and consumer prices. A similar rule could apply to the GATS although some modification might be necessary if a commitment does not impact on both consumer and producer prices.

In this paper, the analysis of the TRIPS has been brief ⁽²⁴⁹⁾. However, the meaning of the words taken over from Article XXIII of the GATT must be necessarily limited to the meaning of the words in the GATT. On that basis, the words can only apply to negotiated commitments of which there are none under the TRIPS. It is submitted that the incorporation of the non-violation clause was completely inconsistent with the object and purpose of the Agreement and was a mistake which occurred through ignorance of the proper role that the good faith principle can play and probably through an excessive reluctance to amend the dispute settlement clause taken over from the GATT.

This is written at a time when my nation has not long ago and with great respect buried the proposer of the original non-violation clause, Dr HC Coombs, with a state funeral. It is with the greatest respect then that I conclude that although the seeking of market access and harmonization of policy might be done with good intentions, permitting the non-violation clause to become broad enough to prevent sovereign states from achieving welfare enhancing policy objectives by any instrument at all without risking retaliation might well be one "paving stone" in the road to hell of which Dr Coombs' adversary, Dr Holloway, warned ⁽²⁵⁰⁾.

(249) On non-violation in TRIPS, see Cottier & Schefer (1997, see fn188) and Roessler (1997, see fn13).

(250) See E/PC/T/A/PV/5 at p. 10.

ANDREA COMBA

COMMENTS

An exhaustive commentary on Brett G. Williams paper on "Non-Violation Complaints in the WTO System" would be impossible, as the work is very long and very detailed. To my knowledge, it is perhaps the most complete work on the subject, with an original approach worthy of much broader discussion. Here, I will make only a few brief remarks.

A) The first regards the assertion in the paper's introduction that "the concept of non-violation complaints in the law of the World Trade Organization is almost unique in international law." This observation is correct. To be more precise, however, it may be necessary to take into account references to the distinction between substantive law and procedural law and within the last one between the administrative negotiating proceedings concerning the administration of the agreement and the contentious negotiating proceedings.

With respect to substantive law, and in particular to general international law, the question is raised whether within this framework, situations of responsibility may occur even where the Agreement has not been violated. This question is presently being tackled by the International Law Commission of the United Nations, who is studying international responsibility for damage resulting from activities which do not breach international law; however, no definitive conclusions have yet been reached. The doctrinal debate focuses primarily on State activities or practices which are highly dangerous and pollutive, with particular attention on the question of restitution for pollution damage caused by the use of nuclear energy.

In the context of international economic law, the problem of responsibility where no breach has occurred was first posed with

respect to expropriation or nationalization of alien property, and only recently has been raised with respect to international trade law. Today there is no doubt that a State has a legal right to expropriate or nationalize alien property within its territory, but only if this is done in the public interest, if it is not discriminatory, and if the alien owner is duly compensated. The absence of just one of these elements renders the act illegal, thus liability arises not from legal but rather from *illegal* behavior.

In international trade law, a second hypothesis has been cautiously advanced, according to which there exists a general principle on the basis of which States are to ensure that trade continues uninterrupted and are to avoid behavior — even legitimate behavior — which might upset the balance between the parties. In this case, therefore, State responsibility arises from behavior which, though legitimate in the sense that it conforms to concessions or benefits granted in previous negotiations, causes injury to the production of another State.

Attempts to determine responsibility where no breach has occurred in the context of general international law have not yet led to any concrete results. The existence of such a rule — which remains to be shown — would presuppose a legal system endowed with a strong solidarity, where certain fundamental values are given absolute protection, independent of the behavior, wrongful or otherwise, of its subjects.

A different conclusion may be reached in the passage from general international law to treaty law. One example of responsibility where no wrongful act has occurred is found in Article II of the Convention on International Liability for Damage Caused by Space Objects of March 20, 1972. Article II calls upon States to respond even to events for which they are not imputable. Analogous situations are contemplated in certain treaties which create international economic organizations, and in particular in the system of exceptions and safeguards which justify the temporary suspension of obligations where their implementation may lead to damage unforeseen at the time the agreement was signed. The application of safeguard measures is not, therefore, a justified response to the unfair trading behavior of another contracting party.

B) With respect to procedure (or, as Professor Panebianco so rightly put it, the judicial diplomacy system), Williams points out that:

"...Historically, the existence of the non-violation complaint derives from the use of nullification or impairment as a criterion for activating consultation procedures in bilateral tariff treaties. However, the inclusion of non-violation complaints in the original negotiation and drafting of the GATT was contentious."

This remark also merits further development. Consultations between the contracting States to a trade agreement are not contentious when the object is to determine again the amount of customs duties in case reciprocal advantages agreed upon result to be nullified or impaired. Here, Williams is correct. The nature of non-violation complaints within the GATT framework must be clarified, however. The legal structure of the General Agreement, in its original form, ignored the principle of separation of powers. The only original body which existed, the CONTRACTING PARTIES, exercised a double function: of an administrative-political nature, since they were responsible for the management of the agreement and the resolution of disputes (though by means of panels of experts charged only with the task of investigation and instruction relating to the controversy.) The body was conceived as a conference of States continually striving for consensus among the parties so as to avoid imposing decisions against the will of any single State. This led to confusion between the administrative activity consisting in managing the mechanisms set up for the achievement of the objectives of the agreement and the contentious function designed for the settlement of disputes which had already been identified between the parties. There was little difference between the continued negotiations related to the functioning of the organization and the consultations which gave rise to contentious proceedings. Both were characterized by the continued quest for reciprocal benefits and consensus. The General Agreement's subsequent institutional evolution, and especially the entry into force of the Understanding on the Rules and Procedures for the Settlement of Disputes clearly and comprehensively highlights the method and means for the settlement of disputes through both diplomatic and legal channels. The

Understanding is composed of 27 Articles, compared to only two (XXII and XXIII) in the General Agreement. However, the explicit reference to the principles contemplated in Articles XXII and XXIII demonstrates that there may still be gray areas where the distinction between the administrative phase and the contentious one is not clearly defined.

C) Williams refers to a series of GATT articles where, in his opinion, the protection of economic interests prevails over the rights of the parties. In reality, the protection of economic interests without violating obligations arising from the agreement is complete only in Article XIX. As already noted, this article authorizes a contracting party, under specific circumstances, to partially or totally suspend its obligations under the agreement, or to withdraw or modify a concession with respect to a specific product. Such authorization is contingent upon a clear surge in the importation of that product, in quantities and under conditions of sales that may cause or threaten to cause serious harm to the national producers of like products or to direct competitors. This rule serves to give the contracting parties the possibility to suspend concessions based on the agreement so as to protect (exceptionally) one of their productive sectors. The application of safeguard measures is not justified by an illicit practice of the State from which the import surge arises — as in the case of dumping or subsidies. The exporting State does not behave uncorrectly, but it exercises one of its rights in accordance to the rules of the Agreement.

Nevertheless, with the entry into force of the Agreement on safeguards, Article XIX has assumed a wider dimension. The connection between the notable increase in imports and the commitments that the importing State has taken on by virtue of the General Agreement has been eliminated. Any notable increase in imports, absolute or relative (with reference to the importing State's production), constitutes an "abnormal event" within the context of international trade. Thus the provision no longer operates as an "escape clause" functioning only with respect to commitments under the General Agreement and to a sudden change of circumstances. It becomes a general instrument (subject to time limits and other

conditions, and to the intervention of the Safeguards Committee) for the maintenance of an equilibrium in the exchange of goods and for the prevention of abnormal situations harmful to production in the importing State.

The new formulation of GATT Article XIX may indeed strengthen the thesis, defined by Williams as typically economic, according to which all obligations arising from the General Agreement are conditioned by the maintenance of equilibrium in international trade.

VII.
DISCUSSION

COSIMO RISI

SOME REFLECTIONS ON THE PARTICIPATION
OF THE EC IN THE WTO

The honor and the onus of concluding today's conference rest on me. I would first like to add a brief footnote to what Professor Olesti Rayo and Professor Mengozzi have just said because their references to social rights in the ambit of international trade are of particular interest to me. Use of the term "social rights" is relatively recent, since we generally use the now-codified term "*internationally recognized core labour standards*", which was adopted at the conclusion of the 1996 Singapore Ministerial Conference. Of this Conference, I remember the preparatory stage, that was troubled just on that point. In fact, certain WTO Contracting Parties, including the United States and several Member States of the European Union (Italy comprised), pushed for Singapore to send a broad message in favor of social rights. The lack of respect for social rights in certain regions of the world had to be considered doubly dangerous, first as an unacceptable attack on human dignity, and second as a threat to international trade in the form of social dumping. The foresight of those countries is demonstrated by the crises in Indonesia and various other Asian countries. Indonesia has pointedly demonstrated that there exists no solid affirmation of social rights, and that these rights are among the first to be disregarded in the face of economic and financial crises.

In fact, the failure to achieve a formal recognition of social rights at the Singapore Conference was due to the objective convergence of many developing countries — especially Asian — together with certain Western countries that rejected the idea. In the European Union, the United Kingdom, then under the influence of a conservative government, opposed contaminating the free market

ideology with social drifts. The notion of "core labour standards" was retained, but its regulation was placed in the hands of the International Labor Organization, or rather, as the French call it, the International Labor Office because, in their opinion, it is more a bureau than an organization. Thus the attempt to divert the trade-related social problem to other fora less binding than the WTO was successful.

Social *volet* is tremendously current not only because of the effects of the Asian crisis, but also because at this moment in Geneva the 50th anniversary of the multilateral trade system is being celebrated with a new ministerial conference where this very same question is being discussed. The outcome is predictable: social rights will continue to be followed by the ILO, thus preventing the WTO from become infected with the issue.

Prof. Mengozzi has invited me to comment on the various papers dealing with the participation of the EC to the WTO as a whole, without dwelling on any one particular point. Well, I was given five papers to read, none of which were simple especially because some were written with particular finesse and technical detail. They are the contributions of Baroncini, Winter, Esposito, Malaguti, and Einhorn. A common thread weaves through them all: this is the reference (to a greater or lesser extent) to the WTO dispute settlement system and its double grade of first instance and appeal. Each examines the new regime and the new dispute settlement body, which is defined by all as a true innovation in the WTO. I was struck by an expression — or rather, a pair of expressions — used by Baroncini. She maintains that the system of the composition of disputes indicates a passage from a power-oriented diplomacy to a rule-oriented diplomacy. This transition is fascinating also from a scientific point of view. It is, however, paradoxical: diplomats do all they can to see that this transition is never completed. International trade diplomacy based on power and on the confrontation among powers is classic diplomacy. On the other hand, diplomacy based on rules requires the surrender of the powerful State to certain rules. It thus entails an acceptance of limits on its power and political discretion, and submission to an international para-judicial body over which little or no control may be exercised.

This is a tremendous sacrifice to ask of the large powers because it implies giving up a slice of sovereignty in foreign economic policy matters. It is a sacrifice made only with great reluctance, and sometimes — and here is another paradox — only with the encouragement of the WTO itself. Here for example, I would like to cite the text-book case of extra-territorial application of American law: Helms-Burton or the Libertad Act, aimed at reviving liberty in Cuba, and D'Amato-Kennedy, aimed at bringing liberty and civil rights to Libya and Iran. These are both examples of extraterritorial legislation because they have the effect of boycotting enterprises of third countries which trade with Cuba, Libya and Iran.

At the end of 1996, Helms-Burton was object of a request for the establishment of a WTO panel by the European Union precisely because of its extraterritorial effects. After the request was made, there was a frenetic movement by interested countries, with the encouragement of the WTO Secretariat, to prevent a panel, once created, from effectively meeting and debating the issue. Why such agitation? Because a conflict of this nature brought to the WTO would probably have undermined the WTO system: the United States, concerned about losing the panel, would likely have invoked the national security clause and consequently politicized the controversy to such point that it could not be pursued within the WTO. The WTO, confronted with its greatest challenge to date, would have been forced to declare its own impotence to settle the dispute. Hence the push towards a non-judicial resolution of the dispute.

As often occurs in diplomacy, there are no solutions to the problems: they are simply set aside to be dealt with at another more opportune moment, as has been the case with the American measures from April 1997 until today. Just today, May 18, representatives of the United States and the European Union are in London creating a new agreement to push ahead the dispute while awaiting clarification of the internal American situation between the Democratic Administration and the Republican majority in Congress. The fact that a solution may be in sight also for the Libya case gives those of us here in Italy cause to be happy, as we are principle trading partners with Tripoli.

To conclude my remarks on Baroncini's very pointed and accu-

rate paper, I particularly like the idea of the passage from one kind of diplomacy to the other, and I have taken the liberty to introduce some practical precautions with regard to it.

Winter's contribution dwells on the hormones dispute, and introduces the principle of psychological choice in the ambit of trade controversies. The European consumer's psychological attitude towards certain products differs from that of the American consumer. Perhaps Europeans tend to fear meat raised on hormones because they are accustomed to a rural and qualitative conception of agriculture, as opposed to the American, whose conception is intensively productive.

Agriculture, and the Common Agricultural Policy (CAP) in particular, is a fundamental issue in the European Union's participation in the WTO. On an internal level, the European Union needs to reform its CAP both for budgetary purposes and in order to accept countries applying for admission. On an external level, the modifications are necessary in order to undertake the next round of agricultural negotiations within the WTO framework where it is pitted against the United States and other big agriculture producers.

The relationship between the European Union and the United States is a constant discussion within the WTO. In 1995, the New Transatlantic Agenda sought to renew the relationship with the United States in all its aspects. Three years later, it cannot really be said that this relationship has seen much improvement. In March 1998, the British Commissioner launched the idea for the New Transatlantic Marketplace, which was to create more than a free trade area. The British proposal was supported by the Commission, but was subsequently rejected by the Council at France's encouragement, for reasons which we Italians share.

The first reason is that is impossible to speak of a free trade area while the United States persists in applying extraterritorial legislation and in enacting sub-federal measures of the same tenor (such as *Massachusetts v. Birmania*.) The second reason is that such ambitious negotiations may involve sectors which are particularly sensitive in the European Union: for instance, agriculture, which was only touched upon in Marrakech, and audiovisuals, which are considered to be particularly important elements of European cul-

ture, are excluded from the Commission's proposal, but they remain high on the American list of priorities. In the service sector, several Member States pay for the delays and inefficiencies which prejudice competitiveness with respect to American industry.

I would like to conclude by turning again to agriculture because it is a traditional topic in multilateral negotiations. Europe has made headway with the idea that agriculture is also of a certain social relevance, a stronghold in the continental way of life: regions abandoned by farmers risk decline, therefore agriculture is also defended as a principle. We are, however, aware, that a further reform of the CAP than the MacSharry reform of the early 1990s is necessary.

Italy embraces multilateralism: it is not by chance that the Director General of the WTO is Italian. We embrace multilateralism even if we begin to perceive its risks — risks in particular regarding certain traditional factors such as marginal agriculture and rural settlements. Like, after all, those factors which touch the social and cultural identity of all of us.

Thank You.

PIETRO MANZINI

ENVIRONMENTAL EXCEPTIONS OF ART. XX GATT 1994 REVISITED IN THE LIGHT OF THE RULES OF INTERPRETATION OF GENERAL INTERNATIONAL LAW

SUMMARY: 1. The nature of the "conflict" between international trade and environment. — 2. The unsatisfactory structure of the relationship between international trade and the environment in the application of GATT Article XX and the need to re-evaluate the rule in light of the rules of interpretation of general international law. — 3. The effective rules of interpretation of general international law and the legal force of the GATT 1947 panel reports in the interpretation of GATT 1994. — 4. Reasons why a narrow interpretation of GATT Articles XX (b) and (g) is unacceptable. — 5. The interpretation of the expressions "necessary" and "relating to" as they appear in GATT Articles XX (b) and (g) respectively. — 6. The problem of the extraterritorial reach of national environmental protection measures: conclusions of the panel in *Tuna/Dolphin II*. — 7. Another possible solution in light of the rules of interpretation of international law. — 8. The balance between international trade and the environment resulting from the proper interpretation of the *chapeau* of GATT Article XX.

1. *The nature of the "conflict" between international trade and environment.*

The United Nations action program for the world-wide pursuit of sustainable economic development, also known as Agenda 21 ⁽¹⁾, which was adopted at the 1992 Rio Conference, is based

(1) *Agenda 21, The United Nations Action Programme from Rio*, New York, 1992. On this and more generally on the results of the Rio Conference, see MARCHISIO, *Gli atti di Rio nel diritto internazionale*, in *Riv. dir. int.*, 1992, p. 581 ff.; TREVES, *Il diritto dell'ambiente a Rio e dopo Rio*, in *Riv. giur. amb.*, 1993, p. 577 ff.; POLITI, *Tutela dell'ambiente e 'sviluppo sostenibile': profili e prospettive di evoluzione del diritto internazionale alla luce della Conferenza di Rio di Janeiro*, in *Studi in onore di Giuseppe Barile*, Padua, 1995, p. 451 ff.

upon the assumption that environmental protection and the liberalization of international trade are mutually compatible and largely reconcilable objectives. The program affirms that "environment and trade policies should be mutually supportive", for the reason that an open multilateral trade system fosters a more efficient allocation and use of productive resources and therefore contributes to increased production and income and to a reduction of the "demands on the environment". A liberalized trading system provides more resources both for economic growth and development and for better protection of the environment, thus contributing to sustainable development and at the same time positively impacting the environment ⁽²⁾.

I believe that this assumption depicts a relationship between environmental protection and international trade liberalization which is over-simplified and much less conflictual than, in fact, it really is.

It is certainly true that trade liberalization, by driving States to compete with each other, encourages the optimal use of natural resources. This does not, however, automatically lead to reduced demand of environmental goods, it does only lead to less wasteful use and consideration for alternative uses and the economic value of these goods on the world market. On the other hand, trade liberalization increases the volume of trade and therefore entails an increase in the quantity of natural resources and environmental goods necessary to produce the goods and services that are traded.

It is also true that trade liberalization can free up more resources

(2) Agenda 21, cit., pt. 2.19. The text seems to recall the first part of Principle 12 of the Rio Declaration where it is noted that: "States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation". The United Nation's position, not surprisingly, was shared by the WTO Committee on Trade and Environment, which in November of 1996 adopted a report in which it affirmed that policies of environmental protection and of trade liberalization "are both important and they should be mutually supportive in order to better promote sustainable development" (pt. 167). This approach is taken up by HOUSMAN, ZAEFKE, *Making Trade and Environmental Policies Mutually reinforcing: Forging Competitive Sustainability*, in *Environmental Law*, 1993, p. 545 ff.

for an "improved environmental protection", leading to a direct proportional relationship between economic well-being and environmental protection. However, this relationship exists only after a critical threshold of industrial development has been crossed; until that point, economic well-being appears to be inversely proportional to the subsistence of the natural environment. This fact is evidenced by the experience of the market economies of industrialized countries. In the initial and intermediate stages of industrial development, natural resources are used to produce wealth even well beyond the point where they are renewable; at these stages, the better off the society is, the worse off the environment is. Only in the mature stage of development, once the existence of a healthy natural environment is viewed by society as a whole as valuable, also in economic terms, does the relationship between well-being and environment become directly proportional. The critical threshold of industrial development where this relationship changes depends on varying factors such as the ability of a given environment to react to economic exploitation, the physical proximity of the environmental problem to the population centers, as well as the sensitivity of the population to environmental questions.

In light of all this, it appears that the judgment expressed by the European Commission in its 1996 Communication to the Council and Parliament on 'Trade and Environment' ⁽³⁾ is all the more pointed and accurate. According to the Commission, the relationship between trade liberalization and environmental protection can be, and often is, controversial. Liberalization can bring about positive effects on the environment such as simplifying the international distribution of clean technologies, services and goods, and frees up resources to protect the environment both for individual undertakings and for governments; however, without a solid measures aimed at responding to potential negative consequences, economic activity strengthened by trade liberalization can in fact increase pressure on the environment and natural resources (such as water resources, agricultural land, timber, and fisheries). In addition, without na-

(3) - Commission Communication to the Council and European Parliament on Trade and Environment of February 28, 1996, COM (96) 54 def.

tional strategies for sustainable development that guarantee the incorporation of environmental protection needs into all policies pertaining to relevant sectors, as well as the internalization of environmental costs, the negative impact on the environment could be aggravated by policies aimed at short-term economic benefits (for example, the development of highly-polluting export industries) ⁽⁴⁾. In an effective synthesis, the Commission observed that the existing tensions between trade and environmental policy arise principally from the fact that while the international trade regime aims continually to lower tariffs and barriers to trade, environmental objectives can only be met by controlling trade in certain categories of products ⁽⁵⁾.

2. *The unsatisfactory structure of the relationship between international trade and the environment in the application of GATT Article XX and the need to re-evaluate the rule in light of the rules of interpretation of general international law.*

Having outlined the conflicting aspects that characterize the relationship between the objective of trade liberalization and the requirements of environmental protection, it must be noticed that the 1947 GATT, although unquestionably the most important instrument in the liberalization of trade in goods prior to the creation of the WTO, allowed little room for the adoption and implementation of environmental protection measures.

First of all, the 1947 GATT contained only one provision relating to environmental protection: Article XX. This article outlined general exceptions to the principles of free trade established by the Agreement, principles such as most favoured nation (Article I), national treatment, (Article III), the prohibition of dumping (Article VI), the elimination of quantitative restrictions (Article XI) and the prohibition of government subsidies (Article XVI). Among the exceptions, the environmental protection is not expressly contemplated, however, it is closely linked to the requirements of

(4) Communication, cit., p. 5.

(5) Communication, cit., p. 12.

environmental nature which appear in paragraphs (b) and (g) of Article XX:

“...Nothing in Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...:

b) necessary to protect human, animal or plant life or health...;

g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption....;

In addition to these conditions, in order to qualify as an exception to GATT principles in the sense of Article XX, a national environmental protection measure must satisfy the condition established in the *chapeau*, or preamble, of Article XX which provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade....

Secondly, the two GATT 1947 panels that were asked specifically to decide issues concerning the relationship between trade and environment — in *Tuna/Dolphin I* and *Tuna Dolphin II* ⁽⁶⁾, regarding United States import restrictions on Mexican tuna — came up with a definition of the structure of that relationship based on GATT Article XX that was later found by most to be unsatisfactory and unbalanced in that the interpretation was characterized by a marked emphasis on the principle of trade liberalization and little regard for environmental imperatives ⁽⁷⁾.

(6) United States Restrictions on Imports of Tuna, Panel Report of 1991, in *Int. Leg. Mat.*, 1991, p. 1594 ff.; Panel Report of 1994, in *Int. Leg. Mat.*, 1994, p. 839 ff.

(7) On panel reports dealing with the restrictions on imports of tuna, see in particular, BLACK, *International Trade vs. International Protection: the Case of the U.S. Embargo on Mexican Tuna*, in *Law and Policy of International Business*, 1992, p. 123 ff.; DUNOF, *Reconciling International Trade with Preservation of the Global Commons: Can we Prosper and Protect?* in *Washington and Lee Law Rev.*, 1992, p. 1405; SKILTON, *GATT and the Environment in Conflict: The Tuna Dolphin Dispute and the Quest for an International Conservation Strategy* in *Cornell Int. Law. J.*, 1993, p. 455 ff.; CHARNOVITZ, *Environmentalism Confronts GATT Rules*, in

The creation of the WTO has not had much affect on this relationship⁽⁸⁾. The 1994 GATT comprises, among other things, the unaltered text of GATT 1947 (along with its subsequent amendments and modifications), thus Article XX remains unchanged. None of the multilateral or plurilateral agreements specifically address the environmental problem. The Agreements on Technical Barriers to Trade, on Sanitary and Phyto-sanitary Measures, and on Subsidies and Countervailing Measures touch lightly on the question, although its incidence may progressively become more significant. And finally, the Decision on Trade and Environment adopted by the Ministers at the signing of the Final Act of the Uruguay Round at Marrakech does not express any definite position to be taken; instead it reflects only the desire to create a Committee on trade and environment to analyze and define the terms of the problem.

Given the situation, legal instruments have been sought, *de iure condendo*, which might serve to balance the relationship between trade and environment⁽⁹⁾. Suggestions have included: the adoption

JWT, 1993, p. 37 ff.; THAGGERT, *A Closer Look at the Tuna-Dolphin Case: "Like Products" and "Extrajurisdictionality" in the Trade and Environment Context*, in *Trade and Environment: The Search of Balance*, ed. Cameron, Demaret, Geradin, London, 1994, p. 69 ff.; FARINELLI, *Sul ricorso a misure di politica commerciale per la tutela dell'ambiente: dopo il tonno messicano quello comunitario*, in *Riv. dir. int.*, 1995, p. 397 ff.

(8) See: SHULTZ, *The GATT-WTO Committee on Trade and Environment - Towards Environmental Reform*, in *Am. J. Int. Law*, 1995, p. 423 ff.; QUICK, *The Agreement on Technical Barriers to Trade in the Context of Trade and Environment Discussion*, in *The Uruguay Round Results - A European Lawyers Perspective*, Brussels, 1995, p. 311 ff.; MANZINI, *Tutela dell'ambiente e libertà degli scambi nel sistema dell'Organizzazione mondiale del Commercio*, in *Le nuove leggi civili commentate* 1996, p. 185 ff.

(9) The literature on the debate between trade and environment in the context of the GATT is vast. See, for example, PAYE, *La protection de l'environnement dans le système du GATT*, in *Rev. belge droit int.*, 1992, p. 67 ff.; JACKSON, *World Trade Rules and Environmental Policies: Congruence or Conflicts?* in *Washington and Lee Law Rev.*, 1992, p. 1227 ff.; SHOENBAUM, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?* in *Am. J. Int. Law*, 1992, p. 700 ff.; PETERSMANN, *International Trade Law and International Environmental Law*, in *JWT*, 1993, p. 43 ff.; THOMAS, TEREPOLSKY, *The Evolving Relationship Between Trade and Environmental Regulation*, in *JWT*, 1993, p. 23 ff.; REGE, *GATT-law and Environmental-Related Issues Affecting the Trade of Developing*

of formal amendments to the GATT; an authoritative interpretation by the Conference of Ministers and the General Council within the meaning of Article IX of the WTO Agreement; the stipulation of additional Protocols regarding environmental issues; and finally, the adoption of an agreement or the formulation of other legal instruments aimed at clarifying the relationship between GATT rules and those of the various multilateral environmental agreements (MEAs) which are in force among many WTO members ⁽¹⁰⁾.

These instruments, taken individually or jointly, represent important means to achieving the indicated goal, and their adoption must be, in any case, warmly encouraged. Nevertheless, at the conclusion of the WTO Ministerial Conference at Singapore in December of 1996, it became clear that today there is no consensus on the matter, and that no such instrument will be adopted, at least in the near future. In the final declaration of the Conference, the Ministers of the Member States, approving the work and analysis carried out by the Committee on Trade and Environment, concluded

Countries, in *JWT*, 1994, p. 95 ff.; KINGSBURY, *The Tuna-Dolphin Controversy, the World Trade Organization, and the Liberal Project to Reconceptualize International Law*, in *Yearbook Int. Env. Law*, 1994, p. 1 ff.; CHARNOVITZ, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, in *Cornell Int. Law J.*, 1994, p. 459 ff.; MUNARI, *La libertà degli scambi internazionale e la tutela dell'ambiente*, in *Riv. dir. int.*, 1994, p. 183 ff.; PEARCE, *The Greening of the GATT: Some Economic Considerations*, in *Trade and Environment: The Search of Balance*, cit. p. 20 ff.; JAKSON, *Greening the GATT: Trade Rules and Environmental Policy*, id., p. 39 ff.; FALK, *Environmental Protection in an Era of Globalization*, in *Yearbook Int. Env. Law*, 1995, p. 3 ff.; CHEYNE, *Environmental Unilateralism and the WTO/GATT System*, in *Georgia J. Int. and Comp. Law*, 1995, p. 433 ff.; PETERSMANN, *International and European Trade and Environmental Law after the Uruguay Round*, London, The Hague, Boston, 1996, in part. pp. 1-51; SCHOENBAUM, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, in *Am. J. Int. Law*, 1997, p. 268 ff.; FRANCONI, *La tutela dell'ambiente e la disciplina del commercio internazionale*, in *Diritto ed organizzazione del commercio internazionale dopo la creazione della Organizzazione mondiale del commercio*, *Atti del Convegno S.I.D.I. 1997*, Naples 1998, p. 147 ff.; MUNARI, *Il rapporto tra liberalizzazione del commercio internazionale e tutela dell'ambiente con particolare riguardo agli aspetti relativi alla proprietà intellettuale e agli investimenti*, id. p. 181 ff.

(10) On this problem, see in particular the Report of the WTO Committee on Trade and Environment, par. 5-23; see also FRANCONI, *La tutela dell'ambiente*, cit.

with the rather general statement that: "...the breadth and complexity of the issue covered by the Committee's Work Programme shows that further work needs to be undertaken on all items of its agenda, as contained in its report. We intend to build on the work accomplished thus far, and therefore direct the Committee to carry out its work, reporting to the General Council, under its existing terms or reference" (11).

In consideration of the above, in order to contribute to a more balanced relationship between environment and international trade, it seems worth moving in another direction to investigate interpretive analysis of GATT 1994's Article XX, which, in fact, could lead to quite different results than those arising from the interpretation of GATT 1947's Article XX. While interpretation of this article under GATT 1947 was undertaken in a rather incoherent manner, often using methods that do not conform to treaty law (12), the interpretation of GATT 1994 is becoming solidly anchored to the rules of interpretation of general international law. This changed is instigated by Article 3(2) of the Understanding on the Rules and Procedures for the settlement of disputes (hereinafter DSU) (13),

(11) Singapore Ministerial Declaration, WT/MIN(96)/DEC/W, published in *Diritto ed organizzazione*, cit. p. 353 ff.

(12) See LIGUSTRO, *Le controversie tra Stati nel diritto del commercio internazionale: dal GATT all'OMC*, Padua, 1996, p. 620, in which the author expressly defines the panel's interpretation of GATT 1947 as "methodologic eclecticism". This eclecticism is manifested in limited and incoherent acceptance of the rules of interpretation of treaties and in the attribution of different weight and priority to different means of interpretation of general international law aiming to privilege, at least initially, the role of the preparatory work more than the object and purpose of the treaty. On the practical application of interpretive methods in the GATT 1947 panel "case law", see also HALLSTROM, *The GATT Panels and the Formation of International Trade Law*, Stockholm, 1994, p. 202.

(13) On the content of the Understanding and the impact of reports issued pursuant to its provisions, see, among others, KUYPER *The New WTO Dispute Settlement System: The Impact on the Community*, in *The Uruguay Round Results. A European Lawyers Perspective*, Brussels, 1995, p. 87 ff.; MENGIOZZI, *The Marrakesh DSU and Its Implications on the International and European Level*, ibidem, p. 115; CUCUZZA, FORABOSCO, *Il sistema di risoluzione delle controversie commerciali tra Stati dopo l'Uruguay Round del GATT*, in *Riv. comm. int.*, 1996; LIGUSTRO, *Le controversie tra Stati*, cit.; Id. *Il sistema di soluzione delle controversie dell'OMC e la prima prassi applicativa*, Report given at the second Convegno S.I.D.I. held in

which provides: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with the *customary rules of interpretation of public international law*. Recommendations and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements" (14).

This provision, as I will try to demonstrate in the following sections, may cause GATT 1994 Article XX to take on greater significance for the protection of the environment compared to GATT 1947's Article XX.

3. *The effective rules of interpretation of general international law and the legal force of the GATT 1947 panel reports in the interpretation of GATT 1994.*

Before continuing, two preliminary clarifications need to be made.

The first has to do with the identification of the rules of general international law referred to in DSU Article 3(2). In other words, exactly which "customary rules of interpretation of public international law" are at issue, if it is in light of these rules that GATT Article XX is to be interpreted? The answer to this question may seem rather evident today. Few would argue that the rules of interpretation referred to in DSU Article 3(2) are those contained in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (15). Doctrine and case law, especially that of the Interna-

Milan, June 5-6, 1997, in *Atti del Convegno*, not yet published; SACERDOTI, *Il doppio grado di giudizio nelle giurisdizioni internazionali*, in *XXI Comunicazioni e Studi*, 1997, p. 153 ff.

(14) Emphasis added.

(15) Because of the importance of these provisions for the purposes of this paper, they are reproduced below.

Article 31 identifies "general rules of interpretation" of international treaties as follows:

tional Court of Justice, are in agreement that these rules, today, have

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objects and purposes.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account together with the context:

a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended".

Article 32 contains guidelines for supplementary means of interpretation: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion in order to confirm the meaning resulting from the application of article 31 or to determine the meaning when the interpretation according to the article 31:

a) leaves the meaning ambiguous or obscure; or

b) leads to a result which is manifestly absurd or unreasonable".

On treaty interpretation in this paper, the following were referred to: ROUSSEAU, *Principes généraux du droit international public*, Paris, 1994, pp. 676-764; LAUTERPACHT, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, in *British Yearbook Int. Law*, 1951, p. 1ff.; ID., (1951-54) in *British Yearbook Int. Law*, 1957, p. 203 ff.; GUGGENHEIM, *Traité du droit international public*, I Geneva, 1957, pp. 130-146; BERLIA, *Contribution à l'interprétation des traités*, in *Receuil des Cours*, 1965, I, p. 17 ff.; BENHARDT, *Interpretation and Implied (Tacit) Modifications of Treaties*, in *Zeitschrift für ausländisches öffentliches recht und volkerrecht*, 1967, p. 491 ff.; SCHWARZENBERGER, *Myths and Realities of Treaty Interpretation*, in *Current Legal Problems*, 1969, p. 205 ff.; JACOBS, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference*, in *Int. Comp. Law Quart.* 1969, p. 318 ff.; GROSS, *Treaty Interpretation: The Proper Role of an International Tribunal*, in *Proceeding Am. Soc. Int. Law*, 1969, p. 108 ff.; SINCLAIR, *Vienna Conference on the Law of Treaties*, in *Int. Comp. Law Quart.*, 1970, p. 62 ff.; YASSEEN, *L'interprétation des traités d'après la Convention de Vienne sur les droits des traités*, in *Receuil des Cours*, 1976, III, p. 3 ff.

become a part of general international law ⁽¹⁶⁾. One author suggests that the DSU makes direct reference to the rules in question for the sole reason that certain WTO Members either were not party to the Vienna Convention (such as the United States), or could not be party to it (such as the European Union) ⁽¹⁷⁾.

Furthermore, the Appellate Body operating within the WTO dispute settlement system quickly undertook to clarify that Articles 31 and 32 of the Vienna Convention indeed do contain the rules of interpretation of general international law referred to in DSU 3(2). In its report following the *Gasoline* case ⁽¹⁸⁾, (the first to be delivered in the context of the new dispute settlement system), the Appellate Body stated that the general rule of interpretation found in Article 31 of the Vienna Convention "has attained the status of customary or general international law". It further specified that as such, the rule "forms part of the customary rules of interpretation of public international law" which the Appellate Body has been directed, by article 3.2 of the DSU, to apply in seeking to clarify the provisions of the General Agreement and to other covered agreements' of the Marrakech Agreement Establishing the World Trade Organization (the WTO Agreement)".

In its subsequent report in *Japan - Taxes on Alcoholic Beverages* ⁽¹⁹⁾, the Appellate Body, recalling and the status of customary law reached by Article 31, recognized that, "there can be no doubt

(16) See in particular, GIULIANO, SCOVAZZI, TREVES, *Diritto internazionale (parte generale)*, Milan, 1990, p. 337 ff.; CARREAU, *Droit international*, Paris, 1994, p. 139 ff. In case law, see in particular the judgement of the International Court of Justice in the cases Différend territorial Jamahiriya arabe Ibyenne/ Chad, in *C.I.J. Recueil*, 1994, par. 41, and Différend sur la limitation de zones maritimes entre Qatar et Bahrein, in *C.I.J. Recueil*, 1995, par. 33.

(17) KUYPER, *The Law of GATT as Special Field of International Law*, in *Netherland Yearbook Int. Law*, 1994, p. 227 ff. It should also be kept in mind that in the Tuna/Dolphin II dispute, the United States had explicitly admitted that although it was not a member of the Vienna Convention, it did recognize the Vienna Conventions rules on the interpretation of treaties as part of general international law (see pt. 3.17).

(18) Report of the Appellate Body in *United States - Standard for Reformulated and Conventional Gasoline*, in *Int. Leg. Mat.*, 1996, p. 603 ff.

(19) Report of the Appellate Body in *Japan - Taxes on Alcoholic Beverages*, AB-1996-2.

that Article 32 of the Vienna Convention, dealing with the role of supplementary means of interpretation, has also attained the same status".

The second clarification that must be made has to do with the legal force of the GATT 1947 panel reports in the interpretation of GATT 1994, and in particular of its Article XX. Clearly the interpretation of this latter, carried out in light of the customary rules of interpretation of treaties, may lead to different conclusions regarding the relationship between trade and environment than those reached in the interpretation of GATT 1947's Article XX, as far as it is not conditioned by interpretation of GATT 1947.

This is particularly significant in light of paragraph 1.(b)(iv) of Annex 1A of the WTO Agreement which provides that the GATT 1994 is made up of not only the provisions of GATT 1947, but also a series of other legal instruments including "other decisions of the Contracting parties to GATT 1947". Given that in the context of GATT 1947 the panel reports, when approved by the Members to the agreements, were adopted unanimously through a practice of consensus, it might be argued that these decisions constitute "other decisions of the Contracting parties to GATT 1947" within the meaning of paragraph 1. (b)(iv), and as such, are an integral part of GATT 1994. This would imply that the GATT 1947 panel reports create a sort of binding precedent and, in this sense, it would be difficult to imagine an interpretation of Article XX of GATT 1994 regarding the relationship between trade and environment which strayed notably from interpretations contained in the GATT 1947 panel reports.

In the above referenced *Gasoline* case both the Panel and the Appellate Body addressed this very problem. According to the Panel in this case, the reports adopted by the Members of GATT 1947 "are an integral part of GATT 1994, since they constitute 'other decisions of the Contracting parties to GATT 1947'" (20). This conclu-

(20) *Japan - Taxes on Alcoholic Beverages*, Panel Report of 1996, pt. 6.10. Obviously these are not the reports that were not adopted by the Contracting parties to the GATT 1947. This is recognized in the panel report in question (pt. 6.10) and confirmed in the Appellate Body report (pt. E).

sion was reached by creating a link between the provision in question and Article 31 of the Vienna Convention. As noted, Article 31 of the Vienna Convention contemplates that in the interpretation of a treaty, in addition to the ordinary meaning of the terms of the treaty in their context and in light of the objects and purposes, consideration must be given to “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. According to the Panel: “Panel reports adopted by GATT Contracting parties and the WTO Dispute Settlement Body constitute subsequent practice in a specific case by virtue of the decision to adopt them. Article 1(b)(iv) of GATT 1994 provides institutional recognition that adopted panel reports constitute subsequent practice” (21).

The Appellate Body did not share the Panel’s opinion. It noted that the question had to be viewed in light of the fact that in the context of GATT 1947, Panel reports, although adopted unanimously by the Contracting parties, were binding only upon the parties to the dispute: “A decision to adopt a panel report did not under GATT 1947 constitute agreement by the Contracting parties on the legal reasoning in that panel report. The generally accepted view under GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report” (22).

For this reason, the Appellate Body dissented from the Panel’s conclusions and ruled that adopted Panel reports should neither “constitute subsequent practice in a specific case as the phrase ‘subsequent practice’ is used in article 31 of the Vienna Convention”, nor represent “other decisions of the Contracting parties to

(21) *Ibidem*.

(22) Appellate Body Report on *Japan - Taxes on Alcoholic Beverages*, cit., pt. E. In fact, even the panel, after holding that adopted panel reports constituted “subsequent practice” within the meaning of Article 31 of the Vienna Convention and “decisions of the Contracting parties” within the meaning of Annex 1A 1(b)(iv), concluded — incorrectly, it seems — that it was not necessarily obligated to follow the reasoning or conclusions of previous panels, but only had to give it consideration (see pt. 6.10).

GATT 1947' for the purpose of paragraph 1. (b) (iv) of Annex 1A incorporating the GATT 1994 into the WTO Agreement" ⁽²³⁾.

On the whole, the Appellate Body's argument is much more convincing than that of the panel ⁽²⁴⁾. In fact, there can be no denying the fact that in the GATT 1947 practice of adopting panel reports by consensus, the Members had no intention of making a binding decision *erga omnes* regarding the interpretation or implementation of one or more rules of the Agreement; rather, they gave their approval of the proposed solution to a dispute which was contained in the report and was binding only the disputing parties. In the context of such a solution, however, certain perplexities surface regarding the different character and function of "subsequent practice" within the meaning of Article 31 of the Vienna Convention, and "other decisions" in the sense of paragraph 1. (b)(iv). The Panel found the two terms to coincide, the latter making reference to the former. In reality, "subsequent practice" which meets the conditions of Article 31 (3) (b) is significant in the

(23) *Ibidem*. In connection with this conclusion, the Appellate Body came up with some interesting considerations beyond the function of 1(b)(iv), in reference to Article XVI(1) of the WTO Agreement, which provides: "Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting parties to GATT 1947 and the body established in the framework of GATT 1947". According to the Appellate Body, "Article XVI:1 of the WTO Agreement and paragraph 1(b)(iv) of the languages of Annex 1A incorporating the AGTT 1994 into the WTO Agreement bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system. This affirms the importance to the Members of the WTO of the experience acquired by the Contracting parties to the GATT 1947 — and acknowledges the continuing relevance of the experience to the new trading system served by the WTO. Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO members, and therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute".

(24) See, LIGUSTRO, *Le controversie tra Stati*, cit. The author maintains that, in principle, the adopted reports may qualify as "subsequent practice" within the meaning of Article 31.3(b), but rightly conditions this possibility on the content of the reports to settle into the *opinio juris* of the Contracting parties (p. 349).

interpretation of a treaty, while “other decisions” seem to take on, at least in principle, the function of completing the 1947 GATT.

4. *Reasons why a narrow interpretation of GATT Articles XX (b) and (g) is unacceptable.*

Having made the above clarifications, the first interpretive problem to examine is the question whether Article XX of GATT 1994, in principle, is to be interpreted narrowly due to the fact that it contemplates exceptions to the general principles contained in the Agreement. It is evident that the structure of the relationship between free trade, the guiding principle of the GATT, and the protection of the environment, representing an exception to this principle, depends heavily on the answer to this question.

The Panels in both *Tuna/Dolphin I* and *Tuna/Dolphin II*, on the basis of certain precedents ⁽²⁵⁾, opted for a narrow interpretation of GATT 1947 Article XX. The 1994 Panel, for example, observed: “The long standing practice of panels has accordingly been to interpret this provision narrowly in a manner that preserves the basic object and principles of the General Agreement” ⁽²⁶⁾.

This solution seems incompatible with the interpretation of Article XX of GATT 1994. First of all, no rule of narrow interpretation appears in Articles 31 and 32 of the Vienna Convention ⁽²⁷⁾. This is the consequence of studies conducted before the codification that have noted how international case law demonstrates that narrow interpretation — generally invoked in situations regarding limits on State sovereignty, in cases of agreements predisposed only by one party (interpretation *contra proferentem*), and in relation to

(25) *Canada - Administration of the Foreign Investment Review Act*, Panel Report of 1984, in *Basic Instruments and Selected Documents*, 30S/140, pt. 5.20; *United States - Section 337 of the Tariff Act of 1930*, of 1989, in *Basic Instruments and Selected Documents*, 36S/345 pt. 5.27.

(26) See pt. 5.26 of the report cited, as well as, analogously, pt. 5.22 of the report in the first *Tuna/ Dolphin* case, cit. See also KLABBERS, *Jurisprudence in International Trade Law - Article XX of GATT*, in *JWT* 2/1991, p. 63 ff., where the restrictive interpretation is discussed.

(27) See, in particular, ROUSSEAU, *op. cit.*; LAUTERPACHT, in *British Yearbook Int. Law*, 1949, cit.; BERLIA, *op. cit.*

clauses establishing exceptions to principles — has never found certain and general application, and is used only in a subsidiary and *extrema ratio* manner, when all other methods of interpretation fail to clarify the meaning of the treaty or its clauses.

Second, Article 31 of the Vienna Convention codifies, as a rule of general international law, a somewhat opposite rule ⁽²⁸⁾ — that is, the rule of *effet utile*, expressed in the maxim: *ut res magis valeat quam pereat*. This rule can be viewed in two ways ⁽²⁹⁾. It is understood that the terms used in the treaty can not be interpreted as unnecessary or redundant, or as having an absurd or unreasonable meaning in the context in which they are used. It can also be understood to mean that, in a situation where more than one interpretation is possible, the one which makes the treaty more effective in light of its objects and purposes should be chosen. The International Law Commission, in its Report annexed to the codification project, noted that: “in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in article 27, par 1 [re-numbered article 31 par. 1 in the final version of the Convention] which requires that a treaty shall be interpreted in *good faith* in accordance with the ordinary meaning to be given its terms in the context of the treaty and *in the light of its object and purpose*” ⁽³⁰⁾.

Contrary to a narrow interpretation, this rule requires the complete consideration and full use of all the rules of a treaty, including those contemplating exceptions to the principles. In this perspective, the assumption that exceptions are subject to narrow interpretation is without foundation, particularly since the object of a treaty may very well be to establish, along with principles, the

(28) In this sense, explicitly, LAUTERPACHT, *op. cit.*, p. 62.

(29) See, in particular, BERLIA, *op. cit.*, p. 306 ff.; AMERASINGHE, *Interpretation of Texts in Open International Organizations*, in *British Yearbook of Int. Law*, 1994, p. 175 ff. According to RUSSEAU, *op. cit.*, the two viewpoints correspond to two different rules which tend to be confused: the first reflects the rule of useful effect proper, while the second reflects the object and purpose of the treaty.

(30) Comments of the International Law Commission on Articles 27 and 28 of the Convention on the Law of treaties, in *Yearbook of the International Law Commission*, II, 1966, p. 219.

exceptions to those principles; unless it is specified to the contrary, there is no reason to assume that the parties to a treaty (any party to whatever treaty) wish to reduce the operability or effect of some rules of the treaty ⁽³¹⁾.

With reference to GATT 1994 Article XX, an interpretive framework of the GATT's principles and exceptions in conformity with the interpretive rules expressed in Article 31(1) of the Vienna Convention, and therefore implicitly incompatible with a restrictive interpretation, is found in the Appellate Body's report in the *Gasoline* case. Ruling on the relationship between Article III(4) and XX(g), the Appellate Body noted that Article XX cannot be read so extensively as to subvert the object and purpose of Article III, but at the same time, Article III could not take on a meaning such that it "emasculated" Article XX. The Appellate Body remarked: "The relationship between the affirmative commitments set out in Articles I, III, and XI, and the policies and interests embodied in the

(31) In this sense, see LAUTERPACHT, *op. cit.*, pp. 60-61. BERLIA, *op. cit.*, p. 312 ff., acutely remarks that a restrictive interpretation may be considered as the expression of the rule of useful effect, in the sense that in light of the object and purposes of a treaty, very often a narrow interpretation (but also an extensive interpretation) comes out of one of its own clauses.

On the other hand, it can be observed that in certain international legal orders and especially in the European Community order, interpretation of the exceptions tended to be more restrictive than of the general principles and those affecting the rules of treaty interpretation. The objection is important and must be given adequate consideration. However it seems that *a*) in reality it is just as difficult to draw a coherent interpretive guideline for the problem from the relative practices in legal orders which are more truly international, yet these orders lack the specific relationship with the customary rules of interpretation established by the WTO; *b*) the rules of interpretation in the Community order are not really applicable to other treaties, because today more than ever, the European Community represents a new kind of legal order in the field of international law; *c*) if the GATT were interpreted systematically, Article XX, significantly entitled "General exceptions", would appear to assume a much greater importance than the individual principles and particular exceptions encountered in the Community or other treaties. It may be also pointed out that in a recent and accurate study on the interpretation practice of the International Court of Justice no any relevant application of the principle of narrow interpretation of the exceptions has been found: see TORRES BERNANDEZ, *Interpretation of the Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention of the Law of the Treaties*, in *Liber Amicorum Professor Ignaz Seidl - Hoheveldern*, Boston 1998, p. 721 ff.

'General Exceptions' listed in Article XX, can be given meaning within the framework of the General Agreement and its objects and purpose by a treaty interpreter only on a case-by-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose" ⁽³²⁾.

5. *The interpretation of the expressions "necessary" and "relating to" as they appear in GATT Articles XX (b) and (g).*

As discussed above, GATT 1994's Article XX, like that in GATT 1947, contemplates that national measures may be exempted from the application of the principles of free trade if they satisfy two conditions: 1) the measures in question must not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction of international trade...", and 2) the measures must be "...b) necessary to protect human, animal or plant life or health", or "...g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption...".

The importance of the first condition was consistently underestimated by panels in the application of GATT 1947, and as we shall see momentarily ⁽³³⁾, the interpretation it was given rise many perplexities. For now, however, I turn to the question of the meaning and scope of the expressions 'necessary' and 'relating to' contained in Article XX's paragraphs (b) and (g).

Beginning with the term 'necessary', it must be remembered that in the application of GATT 1947, panel "case law" considered necessary (and thus qualifying as a legitimate exception) only those national measures which were absolutely the least trade-restrictive, i.e. those measures to which there appeared to be no real alternative

(32) Report of the Appellate Body, cit. p. 16.

(33) See *infra*, section 8.

that was less restrictive or less inconsistent with the GATT. This view is expressed in the panel report in *Thailand - restrictions on importation of and internal taxes on cigarettes* ⁽³⁴⁾, adopted November 7, 1990, and reiterated in both of the *Tuna/Dolphin* cases: ⁽³⁵⁾ "...the import restrictions imposed by Thailand could be considered to be 'necessary' in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it..." ⁽³⁶⁾.

This interpretation is incompatible ⁽³⁷⁾ with the general rule of treaty interpretation contemplated by Article 31 of the Vienna Convention, in that it is contrary to the ordinary meaning' of the terms used in Article XX. Clearly the use of the term necessary' in Article XX(b) means necessary for the protection of the life or health of people, animals and health, and not, as the Panels seem to have held, necessary in relation to the protection of the Agreement's principle of free trade ⁽³⁸⁾. It would seem that, rather than interpreting the condition of necessity as contemplated by the provision, the Panels have introduced a completely different criteria for determining the legitimacy of national measures based on a test of "minimal restriction of the principles of the GATT Agreement" —

(34) Report of the Panel in *Thailand - Restrictions in importation of and internal taxes on cigarettes*, in *Basic Instruments and Selected Documents*, 37S/200.

(35) See points 5.24 and 5.34 in the first and second *Tuna/Dolphin* cases respectively.

(36) See point 75 of the Panel report. The panel reached the indicated conclusion by means of a systematic interpretation of Article XX, noting that a previous panel, in relation to the interpretation of Article XX(d), had observed: "A contracting party cannot justify a measure inconsistent with other GATT provisions as necessary' in terms of Article XX (d) if an alternative measure which it could be reasonably expected to employ and which is not inconsistent with other GATT provisions is available to it". (Report of the Panel in *United States - Section 337 of the Tariff Act of 1930*, pt. 5.26.). Beginning with this precedent, the panel in the *Thailand cigarette* case remarked that it "could see no reason why under Article XX the meaning of the term 'necessary' under paragraph (d) should not be the same as in paragraph (b) (point 74).

(37) For criticism of this interpretation, see CHARNOVITZ, *Exploring the Environmental Exceptions in GATT Article XX*, in *JWT*, 5/1991, p. 37 ff.; SCHOENBAUM, *International Trade and Protection of the Environment*, cit.

(38) Analogously, see FANCIONI, *La tutela dell'ambiente*, cit., p. 162

perhaps worthy in itself ⁽³⁹⁾, but having nothing to do with Article XX(b).

Having clarified that the interpretation of the expression 'necessary' as it emerges in GATT 1947 panel "case law" is incompatible with the criteria set forth by Article 31 of the Vienna Convention, let's now examine how Article XX, in the context of GATT 1994, can be interpreted in conformity with the rules of general international law ⁽⁴⁰⁾.

First of all, it can be noted that the term 'necessary' has two different meanings: it expresses the idea of an imperative, in the sense of 'indispensable' or 'unavoidable', and also has a functional connotation as a link between means and ends, in the sense of 'requisite' or 'need'. As such, Article XX(B) could be read as contemplating exceptions to the principles of free trade for those national measures which are *indispensable* "for the protection of human, animal or plant life or health", or to mean simply that such measures are a means of protecting life and health. This problem came up in relation to *Tuna/Dolphin II*. For the European Community, the ordinary meaning for the expression 'necessary' in the context of Article XX(b) was 'indispensable' or 'unavoidable'; for the United States, it was 'needed' ⁽⁴¹⁾. The Panel opted for the former of the two interpretations, but did so pursuant to a line of reasoning which does little to help clarify the issue. The choice was once again based on the test of "minimal restriction of the GATT

(39) See *infra*, section 8.

(40) The Panel in the *Gasoline* case at first appeared to seek an interpretation of Article XX(b) in conformity with its wording and spirit; at point 6.22, in fact, it affirmed that its task was to establish if "these inconsistent measures were necessary to achieve the policy goal under article XX (b)". In the rest of the report, particularly at points 6.25 and 6.29, the Panel recalled and followed the traditional interpretation of 'necessary' which entailed adopting the measure which least restricted the principles of the General Agreement. (See MIGLIORINO, *Le eccezioni ambientali ai principi del gatt nella prassi dei panels*, in *Dir. Comm. Int.*, 1997, p. 673 ff.) The Appellate Body's position on this point is not exactly clear, but is without question different from that of the panel. It looked at the measure in terms of the *chapeau* of Article XX and not of the content of (b). This could mean that only in terms of the preamble does the test of minimally restrictive come into play. See *infra*, part 8.

(41) See points 5.34, 3.64 - 3.77 in the reports in question.

principles”, a test, it must be repeated, which is incompatible with the application of Article XX(b) since the expression ‘necessary’ very clearly refers to measures for the protection of life and health, and not for the protection of GATT free trade principles.

A systematic interpretation of GATT 1994 Article XX, inspired by the rule of the *effet utile*, contrary to what the Panel decided, points to the understanding of ‘necessary’ as meaning ‘needed.’

Furthermore, it is important to note that Article XX may correspond to ten categories of national measures falling within the general exception, based upon six expressions:

1. ‘necessary’ for measures contemplated by (a), (b) and (d);
2. ‘relating to’ for measures contemplated by (c), (e) and (g);
3. ‘for the protection of’ for measures contemplated by (f);
4. ‘in pursuance of’ for measures contemplated by (h);
5. ‘involving’ for measures contemplated by (i);
6. ‘essential’ for measures contemplated by (j);

Thus, the attribution of the meaning of ‘indispensable’ or ‘unavoidable’ to the term ‘necessary’ (in (b), (a) and (d)), is prevented by the use of the term ‘essential’ in (j). This meaning is in fact communicated with far great accuracy and precision by the term ‘essential’ than by ‘necessary’. If, then, the Contracting parties had truly wanted to allow exceptions only for measures which are ‘indispensable’ to human, animal and plant life and health, they would have employed the term ‘essential’ as they did in (j), and would not have relied on the ambiguous and “weak” term ‘necessary’. This interpretation perhaps gives rise to the doubt that the meaning of the term ‘necessary’ may coincide with that of the expression ‘relating to’, also utilized in Article XX. This doubt is to be rejected: the term ‘necessary’ expresses the operational aspect of the objective pursued, a connotation quite separate from the term ‘relating to’ which conveys simply the idea of connection. In this view, the national measures contemplated by Article XX appear, in order of their degree of correlation with the object pursued, distinct:

— in terms of whether they are ‘essential’ or indispensable, without which the objective could not be achieved;

— in terms of whether they are ‘necessary’ or needed as a functional means of pursuing the objective, although they might be

substituted by means which have a different nature but serve the same function;

— and finally, in terms of whether they 'relate to' or simply are connected to the objective though not necessarily directed at its achievement.

From another point of view, it is worth noting that the prospect of interpreting at an international level the judgment of what is 'indispensable' in relation to a given situation implies significant difficulties. This presupposes a profound awareness of the situation in question and of the economic, political and social conditions of the State adopting the measure. Such awareness may not be possible even through the available information channels and instruments of technical consultation provided for in DSU Article 13. More often than not, the situation is one in which a protective measure appears necessary but none of the potential measures is indispensable *per se*, and each has some alternative falling within the discretion of State policy-makers ⁽⁴²⁾. The same problem does not arise in the context of a judgment of 'need', which requires only an abstract evaluation of the operational aspect of the national measure adopted pursuant to the objective of protection.

These above considerations also serve to illustrate problems also with regard to the expression 'relating to' contained in Article XX(g) as elaborated by GATT 1947 Panels. The first report which dealt with this expression was the Herring and Salmon case, adopted on March 22, 1988 ⁽⁴³⁾, in which it was affirmed: "While a trade measure did not have to be necessary or essential to the conservation of an exhaustible resource, it had to be *primarily aimed* at the conservation of an exhaustible resource to be consid-

(42) Similarly, CHARNOVITZ, *op. ult. cit.*, observes "Bans on importing ivory could be challenged on the grounds that a more effective (and more GATT-consistent) way to save African elephants is to privatize them. Any quarantine could be vulnerable to the argument that domestic programs could yield equivalent or greater increments in improved public health" (p. 49).

(43) *Canada - Measures affecting exports of unprocessed herring and salmon*, Panel report of 1988 in *Basic Instruments and Selected Documents*, 35S/98.

ered 'relating to' conservation within the meaning of Article XX(g)" (44).

This interpretation was then taken up by the panels in the two *Tuna/Dolphin* cases (45). Clearly, a measure primarily 'aimed' at the conservation of natural resources is not at all the same as a measure 'relating to', as utilized in the provision in question. This term, interpreted according to its 'ordinary meaning' expresses the idea only of connection and not of aim; therefore the national measure, in order to benefit from the general exceptions of the GATT principles as provided in Article XX, must simply be connected or correlated to the objective of conserving exhaustible natural resources.

In the *Gasoline* case, the Appellate Body rejected the Panel's interpretation which tended to equate the meaning of the expressions 'necessary' and 'relating to', (46) and accepted — as the parties to the dispute did not raise any challenge — the correspondence between the expressions 'relating to' and 'primarily aimed at' (47). The Appellate Body did, nevertheless, indicate that "the phrase 'primarily aimed at' is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g)" (48). In light of the preceding observations, this remark

(44) See point 4.6 of the panel report referenced.

(45) See points 5.31 and 5.22 of the reports of *Tuna/Dolphin I* and *II* respectively.

(46) As the Appellate Body noted, the panel's reasoning is as confused as it is difficult to follow. The point at which the interpretation in question emerges is the following: "Accordingly, it could not be said that the baseline establishment methods that afforded the less favorable treatment to imported gasoline were primarily aimed at the conservation of natural resources. In the Panel's view, the above noted lack of connection was underscored by the fact that affording treatment of importing gasoline consistent with article III:4 obligations would not in any way hinder the United States in its pursuit of its conservation policies under the *Gasoline* rule. Indeed the United States remain free to regulate in order to obtain whatever air quality it wished. The panel therefore concluded that the less favorable baseline establishment methods at issue in this case were not primarily aimed at the conservation of natural resources" (pt. 6.40 of the report cited.).

(47) See pp. 18-19 of the Appellate Body Report.

(48) See p. 19 of the Appellate Body Report. The point was made by SCHOENBAUM, *International Trade and Protection of the Environment*, cit., that the two phrases 'primarily aimed at' and 'relating to' "certainly... are not synonymous.

appears a bit timid, not to mention vague; however, it certainly is indicative of greater attention to the actual language of Article XX.

6. *The problem of the extraterritorial reach of national environmental protection measures: conclusions of the panel in Tuna/Dolphin II.*

A third interpretive question in connection with Article XX may be framed as follows: are the exceptions to the principles of free trade contemplated by the rule under examination applicable only to national measures aimed at protecting the environmental resources located within the territory of the State enacting the measure, or are national measures designed to protect environmental resources that are located outside the State's jurisdiction also permitted? The problem here is to determine whether Article XX(b) and (g) allow States to enact measures that have extraterritorial effect ⁽⁴⁹⁾.

If the answer is negative, a State may limit or forbid the import or export of goods in order to protect environmental resources in its territorial land, waters and air space, wherever it may exercise its power in conformity with international law. If the response is positive, then the State may enact trade restrictions also for the protection of resources located in, for example, international waters or polar regions, so as to protect the so-called *global commons* such as the atmosphere or the Ozone layer. Undoubtedly the best solution by far to protect such resources is a solution based on international consensus ⁽⁵⁰⁾, yet it is also true that because these areas fall under

The primarily aimed at' requirement seems to be an unwarranted amendment of Article XX by the GATT Herring and salmon panel" (p. 278).

(49) DEMARET adopts a different point of view, maintaining that the measures in question do not qualify as extrajurisdictional activities. "Certain TREMs enacted by the United States and the European Community can be viewed as a form of economic coercion intended to bring third countries to change their domestic environmental policy and to legislate accordingly". See DEMARET, *TREMs, Multilateralism, Unilateralism and the GATT*, in *Trade and Environment: The Search of Balance*, cit. p. 52 ff., in part. p. 62

(50) This was also expressed, for example, in Principle 12 of the Rio Declaration, which will be discussed in more detail below. See, *Report of the WTO Committee on Trade and Environment*, and more recently, the *Resolution Adopted*

the jurisdiction of no State, it often very difficult to achieve such a consensus. Considering that the resources mentioned are among those most in danger of long-lasting or permanent pollution damage, it is easy to grasp just how crucial the response to this question is.

Under GATT 1947, the question was examined by the panel in *Tuna/Dolphin II* ⁽⁵¹⁾, however, the analysis is unsatisfactory both in terms of the methodology used and the conclusions reached. The Panel expressly admitted the need to refer to Articles 31 and 32 of the Vienna Convention, but it excluded the application of Article 31(1) and (2) considering that the reference to the context of Article XX left question unresolved ⁽⁵²⁾; furthermore, it appeared that no agreement had been reached among the parties regarding the interpretation of Article XX, nor was possible to identify any practice relating to such Article which might constitute an agreement regarding its interpretation in the sense of Article 31 (3) (b) of the Vienna Convention ⁽⁵³⁾. The Panel instead turned its attention to supplementary instruments for interpretation indicated in Article 32. Here it stated that the preparatory work and documents from the negotiations for the Havana Charter and the General Agreement revealed no decisive indication of the location of the environmental resources mentioned in Article XX (b) and (g). In light of this, the Panel held that also resources located outside the territorial jurisdiction of a State could fall within the application of the provisions cited ⁽⁵⁴⁾. In relation to the exhaustible resources referred to in (g), the panel declared that it "could see no valid reason supporting the conclusion that the provisions of Article XX g) apply only to policies related to the conservation of natural resources located within the territory of the contracting party invoking the provisions" ⁽⁵⁵⁾. By the same

by the General Assembly for Further Implementation of Agenda 21, adopted on June 28, 1997, in *Int. Leg. Mat.*, p. 1639 (1997) ff.

(51) It is seen also in the panel report of the *Tuna/Dolphin I* case (in particular in points 5.22 and 5.34) how with different argumentation, essentially the same results were reached. For a comparison of the two, see MIGLIORINO, cit.

(52) See pt. 5.16 of the report.

(53) See point 5.19.

(54) See point 5.20.

(55) See point 5.20.

token, in relation to living beings and plants contemplated in Article XX(b), it observed that "the text of the Article XX b) does not spell out any limitation on the location of the living things to be protected" (56).

In its subsequent remarks, however, the Panel generally does not recognize the legitimacy, in the sense of Article XX, of the extraterritorial extension of national environmental protection measures (57). After observing that the concrete application of the measures in question could have the effect of forcing other GATT members to modify their own environmental policies, so as to avoid an embargo in cases where such measures are not respected, the panel found the need to interpret Article XX narrowly in order to conform with the objects and purposes of the General Agreement. It specified that national environmental protection measures with extraterritorial reach should be applied only to the citizens and undertakings of the State enacting the measure, but could not be applied to foreigner subjects (58). According to the panel, a different conclusion would alter the balance of rights and obligations deriving from the General Agreement: "If Article XX were interpreted to permit contracting parties to deviate from the obligations of the General Agreement by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would be maintained. If, however, Article XX were interpreted to permit contracting parties

(56) See point 5.31.

(57) It is worth noting the United States' argument in the preliminary stages of the dispute. They argued that the Marine Mammal Protection Act whose application was in question did not really have extraterritorial reach in that it was aimed at activity only within the United States' jurisdiction: "The United States measures concerned activity within the United States jurisdiction — importation and consumption of tuna in the United States market; the United States was not claiming the ability to enforce its law outside the jurisdiction". (see point 3.18 of the report.) In this way, the United States ruled out its intent to engage in coercive activity in the territory of a foreign State, but not to implement within its territory legislation having extraterritorial effects. On this distinction, see PICONE, *L'applicazione extraterritoriale delle regole sulla concorrenza e il diritto internazionale*, in *Il fenomeno delle concentrazioni di imprese nel diritto interno e internazionale*, Padua, 1989, p. 81 ff., in particular pp. 111-112.

(58) See points 5.24 and 5.25 of the reports cited.

to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of the rights and obligations among contracting parties, in particular the right to access the markets, would be seriously impaired" (59).

The weakness of the interpretive arguments used and the contradictions of the conclusions are easy to see. Apart from using a narrow method of interpretation, discussed above, it must be emphasized that there is an evident flaw in the logic in the affirmation that the absence in the preparatory work of a reference which might indicate the location of the environmental resources mentioned in Article XX (b) and (g) leads to the conclusion that these provisions concern environmental resources outside the territorial jurisdiction of the State: the only result which may be deduced from this silence is that the preparatory work cannot serve as a basis for any opinion on the reach of the rule in question (60).

Furthermore, it is inconsistent to affirm that, on the one hand, the environmental resources referred to in Article XX (b) and (g) may be located both within and outside the territorial jurisdiction of a State, and to retain, on the other hand, that the measures to protect those resources may be enforced only with respect to the subjects of the State which adopts the measures (61). If indeed the extraterritorial reach of the national measures is legitimate within

(59) See point 5.26. Regarding applicability to national subjects, the panel observed that "the policy to conserve dolphins in the eastern tropical Pacific Ocean, which the United States had pursued within its jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX (g)". See point 5.20.

(60) For similar conclusions, see FRANCONI, *Extraterritorial Application of Environmental Law*, in *Extraterritorial Jurisdiction in Theory and Practice*, London-Dordrecht-Boston, 1996, p. 122 ff. It should also be noted that the preparatory work, which in the sense of Article 32 is normally relied on only as a complementary means of interpretation in the case where the interpretation of open multilateral treaties such as GATT, are to be used with even greater caution given that there is nothing to indicate the intent of the countries that did not participate in the negotiations; see AMERASINGHE, *op. cit.*, pp. 192-93.

(61) I have already had occasion to observe (MANZINI, *I costi ambientali*, cit., pp. 61-62) that the affirmation of the possible extrajurisdictional application of national laws to subjects of the regulating State is correct in the sense of international law, but irrelevant in the situation of this dispute. See also MURASE, *Perspec-*

the meaning of GATT Article XX, they must be applicable to all subjects of a Member State of the General Agreement. Moreover, it is inconsistent to reject the applicability to foreign subjects of the measures to protect environmental resources located beyond the national territory of a State only in consideration of the fact that this might force other States to modify their own environmental policies. This "forced" alteration of national policy may be the consequence not only of measures having extraterritorial effect, but also of measures of strictly national reach. Limits of international trade undertaken to protect environmental resources located within the territorial jurisdiction of one State may induce the other Member States to alter their own environmental policies in the same way as they may be induced to alter their own policies because of trade restrictions aimed at protecting environmental resources located outside the national jurisdiction. Therefore to deny the extraterritorial applicability of national measures does nothing to eliminate the problem.

7. *Another possible solution in light of the rules of interpretation of international law.*

I think that the solution to the problem above might be found using a completely different methodology than that used by the panel in *Tuna/Dolphin II*.

First of all, an important element of treaty interpretation codified in Article 31 of the Vienna Convention must be highlighted. Despite how often it was invoked by one party ⁽⁶²⁾ during the initial

tive from International Economic Law on Transnational Environmental Issues, in *Recueil des cours*, 1995, p. 253 ff., in part. p. 350.

(62) See pt. 3.38 of the panel report, where the European Community and the Netherlands, after rejecting the argument that of the three instruments of interpretation indicated in Article 31(3), only that contained in (c) was applicable to the this kind of case, maintained that international law did not permit extraterritorial effects of the national rules in question because of the existence of the customary rule of non-intervention in the internal affairs of foreign States. As discussed below, international law indicates the opposite, and the principle of non-intervention is not properly invoked given that, as the *Tuna/Dolphin* decision

stage of the dispute, it was not taken into consideration by the panel in its conclusive findings of the report. Article 31(3)(c) provides that in the interpretation of a treaty, consideration must be given not only to the ordinary meaning of the terms of the treaty in their normal context and in light of the object and purpose of the treaty, but also to "any relevant rules of international law applicable in the relations between parties". This provision means that interpretation is an operation undertaken not in isolation, but involves giving due consideration to the entire body of international rules and principles which form the context in which the treaty is to be inserted and which affect the legal sphere of the parties ⁽⁶³⁾.

Thus, considering the character of the international regime, it can be affirmed that no rule generally prohibits States from attributing extraterritorial reach to their national laws. However, it is unclear ⁽⁶⁴⁾ if this implies a complete freedom for States in this area, or whether the existence of some rules which tends to limit or

demonstrates, measures having extraterritorial effect are implementable even without violating that principle, simply by sanctioning them through a trade restriction to be applied in the national territory. See PICONE, *cit.*

(63) On this rule of interpretation, see in particular BERNHARDT, *cit.*, p. 550; YASSEEN, *cit.*, pp. 62-68.

(64) A non-exhaustive list of the contributions in the area includes: MANN, *The Doctrine of Jurisdiction in International Law*, in *Receuil des Cours*, 1964, I, p. 9 ff.; AKEHURST, *Jurisdiction in International Law*, in *British Yearbook of Int. Law*, 1972-73, p. 145 ff.; MAYER, *Droit international privé et droit international public sous l'angle de la notion de compétence*, in *Rev. gen. dr. int. pub.*, 1979, pp. 1 ff., 349 ff., 537 ff.; MAIER, *Extraterritorial Jurisdiction at a Crossroad: an Intersection between Public and Private International Law*, in *Am. J. Int. Law*, 1982, p. 280 ff.; MEESSEN, *Antitrust Jurisdiction under Customary International Law*, in *Am. J. Int. Law*, 1984, p. 783 ff.; GERBER, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, in *Yale J. Int. Law*, 1984, p. 185 ff.; LOWE, *The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution*, in *Int. Comp. Law Quart.*, 1985, p. 724 ff.; JAQUET, *La norme juridique extraterritoriale dans le commerce international*, in *Jur. dr. int.*, 1985, p. 327 ff.; DEMARET, *L'extraterritorialité des lois et les relations transatlantiques: une question de droit ou de diplomatie?* In *Rev. trim. dr. eur.*, 1985, p. 1 ff.; STERN, *Quelques observations sur les règles internationales relatives à l'application extraterritoriale du droit*, in *Ann. Fr. Dr. Int.*, 1986, p. 7ff.; PICONE, *op. cit.* A recent attempt to classify the theories regarding the question of the extraterritoriality of national measures was undertaken by BIANCHI, *L'applicazione extraterritoriale dei controlli all'esportazione*, Padua, 1996.

condition that freedom must be recognized. In the *Lotus* case ⁽⁶⁵⁾, the Permanent International Court of Justice affirmed that, even though measures of concrete jurisdiction may be exercised only within the national territory of a State, international law does not prevent States from extending their laws to situations beyond their territorial jurisdiction as long as there is no specific rule to the contrary. According to the Court, international law: "...Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them a wide measure of discretion which is only limited in certain cases by prohibitive rules..." ⁽⁶⁶⁾.

In reality, as observed, it is also doubtful that this position corresponds to general international law of today; State practice, in fact, indicates that extraterritorial application of national law may occur only in relation to specific circumstances where there is some particular link to the regulating State ⁽⁶⁷⁾.

Given these indications, it cannot be concluded that the extraterritorial extension of national environmental protection measures contemplated by GATT Article XX is supported by a rule of general international law; however it can be affirmed that, in the absence of a provision to the contrary in Article XX, an interpretation of this Article in favor of the extraterritorial extension of national environmental measures is indeed permissible under international law.

Moreover, this interpretation is indirectly suggested by another principle of international law which has unquestionably moved into the realm of customary law: Principle 21 of the 1972 Stockholm

(65) *Recueil des Arrêts*, Series A, n. 10.

(66) *Recueil*, cit., p. 19.

(67) Extraterritorial jurisdiction under general international law may be exercised on the basis of personality (active or passive depending upon whether jurisdiction is exercised over acts committed by citizens abroad, or by injury caused abroad to citizens; on the basis of the principle of protection (events linked to national security); on the principle of universality (jurisdiction in relation to particularly heinous crimes which affect the general interests of the international community); and based upon the effects doctrine (jurisdiction over commercial practices which have anti-competitive effects in the territory of a State.

declaration on the environment ⁽⁶⁸⁾. This principle, also contemplated in Principle 2 of the Rio Declaration ⁽⁶⁹⁾, provides: "States have... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction". The existence of this principle in the realm of customary law precludes the choice of interpreting GATT Article XX in a way that permits parties to damage the environmental resources located outside their jurisdiction ⁽⁷⁰⁾. In light of this principle, the argument against the extraterritorial extension of environmental protection measures because other parties to the General Agreement are thus forced to alter their own national policies in order to accord greater environmental protection is inconsistent.

Now, with respect to all relevant rules of international law which are applicable in the relationships between the parties, it may be asked what role should be attributed Principle 12 of the Rio Declaration in the interpretation of GATT Article XX. Principle 12 provides: "Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided". Can this declaration be considered as representing *opinio juris*, widespread in the international community, such that it may be held relevant for the interpretation of GATT Article XX (b) and (g)? The response to this question can only be negative. This declaration, in fact, represents a concession by many States in relation to the overall negotiations of the Rio Conference more than

(68) See *Riv. dir. int.*, 1972, p. 779 ff.

(69) See the Annex to Agenda 21, cit.

(70) See MANZINI, *I costi ambientali nel diritto internazionale*, cit. It seems to me that the Commission of the European Community followed a similar orientation in its *Notice on Trade and Environment*, where it observed "In taluni casi eccezionali le norme relative al sistema commerciale multilaterale non dovrebbero precludere l'adozione di misure commerciali nei confronti di un paese che sta violando taluni obblighi normativi fondamentali previsti dalla legislazione internazionale in materie di ambiente, quali l'obbligo di garantire che le attività che si svolgono entro la propria giurisdizione non arrechino danno all'ambiente di altri Stati e l'obbligo di cooperare alla conservazione, alla protezione e al ripristino dell'equilibrio e dell'integrità dell'ecosistema terrestre (Principi 2 e 7 della Dichiarazione di Rio)".

an expression of true conviction ⁽⁷¹⁾. The proof of this lies in the fact that in other sections of the acts coming out of the Conference — which certainly cannot be ignored in the proper interpretation of the Declaration — States expressed opinion that tend significantly to sharpen and reshape it.

To begin, Principle 12 itself specifies that: "Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus". From this statement, it can be deduced that when environmental problems are of transboundary or global character, the adoption of unilateral environmental measures or measures not based on international consensus may not be completely excluded due to the use of the expression "as far as possible". Agenda 21 is even more explicit. As others have noted, this instrument is complementary to, and in some cases even more significant ⁽⁷²⁾ than, the Rio Declaration. Chapter 12 of the Agenda, along with repeating the content of Principle 12, specifies: "Domestic measures targeted to achieve certain environmental objectives may need trade measures to render them effective". To this remark is added that whenever there appears to be a concrete need for such measures, they should be inspired by the principle of non-discrimination, minimally trade restrictive, transparent, and have special consideration for the needs of developing countries ⁽⁷³⁾.

Therefore, a comprehensive reading of Principle 12 — taking into account its context and the other acts which came out of the Rio Conference — reveals not only that States during the Conference did not express an absolute prohibition of the extraterritorial application of national measures, but in fact foreshadowed their adoption when they explicitly recognized that for important objectives of environmental protection, among which are clearly the protection of the *global commons* or natural resources located in *res communis*

(71) For this reason, it is not even possible to hypothesize a rule which prohibits *ad hoc* the extraterritorial extension of national environmental protection measures in the sense indicated by the Permanent Court in the *Lotus* decision.

(72) Cfr. POLITI, cit., pp. 516 ff.

(73) See Chapter 17, point 17.119

omnium, measures restricting trade may be used. This implies, even if just in principle and as *estrema ratio* in the case where adequate international consensus cannot be achieved, the admissibility of the extraterritorial extension of national environmental protection measures contemplated in Article XX (b) and (g).

The text of GATT 1994 confirms these conclusions. Recall that within the meaning of Article 31(2)(a) of the Vienna Convention, the context of a treaty, in the light of which it is to be interpreted, includes, other than the text itself, the preamble and the annexes, also "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty". Given that GATT 1994 is but one of the agreements signed at Marrakech and is to be applied in connection with the WTO Agreement, there is no doubt that the WTO Agreement forms the context (or at least an important part of it) in relation to which the GATT is to be interpreted in conformity with Article 31 of the Vienna Convention.

Thus, in looking at the preamble to the WTO Agreement, one can't help but note the particular emphasis with which the Contracting parties underlined the need to pursue sustainable development in addition to the objective of the expansion of international trade: "...allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development" (74).

As is well-known, the exact parameters of the principle of sustainable development are yet to be determined (75); however it is

(74) It is perhaps worth pointing out that in the cited part of the preamble to the WTO Agreement, the 'optimal use of the world's resources' is mentioned; the preamble to the GATT uses the expression 'full use of the resources of the world'. No particular economic notions are needed to grasp the marked environmentalist emphasis of the text of the WTO Agreement compared to the GATT.

(75) Agenda 21 is undoubtedly the document in which the actions and policies designed to achieve sustainable development on an international level are most concretely and specifically detailed. For a general framework of the concept,

now indisputable that they hinge upon the idea that economic development, although aimed at satisfying the needs of the present generation, must not deprive future generations in either economic or environmental terms ⁽⁷⁶⁾. It can thus be held that respect for this principle is to come about also from the interpretation of GATT 1994 Article XX (b) and (g) which allows for national measures to be directed at the protection of environmental resources located outside the jurisdiction of a State as long as these measures fulfill the right to development and maintain the relative environmental integrity for future generations. From this perspective of environmental conservation, it can be argued that the extraterritorial extension of national measures is possible, with respect to sustainable development, in those rare but evident cases where the resources in question are located in a *res communis omnium*, or the global commons and are at serious risk of depletion, over-consumption or destruction ⁽⁷⁷⁾.

8. *The balance between international trade and the environment resulting from the proper interpretation of the chapeau of GATT Article XX.*

The conclusions reached through the analysis in the preceding paragraphs could lead to think that under GATT 1994 the balance between environmental protection and the liberalization of interna-

see, among others, SINGH, *Right to Environment and Sustainable Development as a Principle of International Law*, in *Studia Diplomatica*, 1988, p. 45 ff.; DUPUY, *Soft Law and the International Law of the Environment*, in *Michigan J. Int. Law*, 1990, p. 420 ff.; BEKHECHI, *Le droit international à l'épreuve du développement durable*, in *Ann. Hauge dr. int.*, 1993, p. 59 ff.; POLITI, cit.; HANDL, *Sustainable Development: General Rules versus Specific Obligations*, in *Sustainable Development and International Law*, London-Dordrecht-Boston, 1995, p. 35 ff.; SANDS, *International Law in the field of Sustainable Development: Emerging Legal Principles*, Ibidem, p. 53 ff.

(76) In particular, see Principle 3 of the Rio Declaration which states: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations".

(77) A similar suggestion is made by BENEDEK, *Implication of the Principle of Sustainable Development, Human Rights and Good Governance for GATT/WTO*, in *Sustainable Development and Good Governance*, Dordrecht, 1995, p. 274 ff.

tional trade — the scales of which were decisively tipped in favor of the latter under GATT 1947 — may be achieved by means of the application of the rules of interpretation of general international law, is excessively stretched in favor of environmental protection. These results affirm that:

1. Article XX's general exceptions to the principles of free trade with respect to environmental protection must not be interpreted narrowly, but rather attributed with adequate *effet utile*;

2. in order to qualify as an exception to the principles of free trade contained in the General Agreement, a national measure can simply be 'needed', or targeted at (but not necessarily unavoidable) the protection of human, animal or plant life or health (Article XX(b)), or they can be even only 'related to' (and thus not even directly connected to the objective but instead just an accessory to it) the conservation of natural exhaustible resources, as long as these measures are equally applied to restrict national production or consumption (Article XX (g)) (78).

3. the national environmental protection measures contemplated by Article XX are susceptible, within certain limits, to extraterritorial application directed at preserving natural resources located in a *res communis omnium* or representative of the *global commons*.

The indicated risk is not run, however. The fact that a national measure fulfills the requirements contained in Article XX(b) or (g) in fact satisfies only the first of two conditions to be met to qualify as an exception to GATT principles. As often repeated, the exceptions contemplated by Article XX must satisfy the other conditions established in the *chapeau* or preamble of the article that such measures "are not applied in a manner which would constitute a

(78) It is worth noting the fact that in the language of Article XX, human, plant or animal life or health seems to receive less protection than natural exhaustible resources. It has been noted, in fact, that in order to insure the former, national measures must be 'necessary', while for the latter they simply must be 'related'. The interpretation proposed does not resolve the problem, but it does give them more respect than the interpretation by panels operating in the context of GATT 1947, for whom national measures protecting life or health had to be indispensable in order to qualify as an exception.

means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade...".

In the application of GATT 1947, this latter condition was object of sporadic and superficial interpretation by panels, whose tendency seemed to be to ignore the content of the preamble to Article XX and to focus the entire question of exceptions to the principles of the GATT on the interpretation of the provisions contained in letter (a) and (j), sometimes perceiving in these provisions requirements such as the test of "least restrictive of the principles of the Agreement," which are not in any way covered by the provisions. And when they did comment on the conditions contained in the preamble, the interpretation they furnished was bizarre to say the least. In its reports on *US - Prohibition of imports of tuna and tuna products from Canada*, adopted February 22, 1982 (79), the panel stated: "...the United States action should not be considered to be a disguised restriction of international trade, noting that the United States prohibition of imports of tuna and tuna products from Canada had been taken as a trade measure and publicly announced as such" (80).

In order to satisfy the requirement that measures not be 'disguised' trade restrictions, it seems sufficient for the State to 'publicly announce' its adoption of national restrictive measures. This line of interpretive reasoning followed by panels is particularly inconsistent with the rules of interpretation such as Article 31 of the Vienna Convention. To ignore the content of the preamble to Article XX and focus only on one part of its provisions means to disregard the interpretive rule of useful effect which states that no term or provision or part of a treaty is redundant or without purpose. Moreover, this rule precludes acceptance of the manifestly absurd interpretation that the simple publication of restrictive measures is

(79) *United States - Prohibition of imports of tuna and tuna products from Canada*, Report of the Panel, in *Basic Instruments and Selected Documents*, 29S/91.

(80) Report cited, pt. 4.8

compatible with a prohibition of 'disguised' restrictions to international trade.

The Appellate Body most sensibly and wisely moved away from this line of reasoning in its own interpretation of the preamble to GATT 1994 Article XX in the *Gasoline* case. It first underlined the essential subordination of national protective measures to the conditions established by the provision in question: "In order to justify that the protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions — paragraphs (a) to (j) listed under Article XX, it must also satisfy the requirements imposed by the opening clauses of Article XX" ⁽⁸¹⁾.

The panel went on to expressly reject the interpretation that had been affirmed in the application of GATT 1947 and clarified that the reach and significance of the conditions established in the preamble by stating, "It is...clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of 'disguised restriction'" ⁽⁸²⁾. According to the Appellate Body, the requirement in question serves to verify that a national measure which might be covered by one or more of the exceptions listed in (a) through (j) is not abused or illegitimately used: "We consider that 'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms or an exception listed in Article X. ...The fundamental theme is to be found in purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX" ⁽⁸³⁾.

As it is interpreted in the *Gasoline* case, the conditions established in the preamble to Article XX eliminate the risk that in the context of GATT 1994, the relationship between environmental protection and international trade weighs too heavily in favor of the former. These conditions, in fact, exclude that just any national

(81) Report of the Appellate Body in the *Gasoline* case, cit., p. 22.

(82) *Ibidem*, p. 25.

(83) *Ibidem*, p. 25.

measure which is *abstractly* 'needed' or connected' to the protection of environmental values or resources *may qualify as an exception to the principles of free trade*. To this end it is necessary to verify that the national measure adopted is *concretely* aimed at achieving the indicated objectives of protection, that it is *proportional*, and that it is not abusive or illegitimately employed. In the context of this verification, there may be room for a test of "least restricting the principles of the Agreement" discussed above ⁽⁸⁴⁾, in the sense that a national measure which is unnecessarily or excessively trade restrictive may be considered abusive or illegitimate. An evaluation undertaken in consideration of Article XX's preamble would not be unlike that in the Danish Bottles case, where the Court of Justice of the European Community, relying on the principle of proportionality linked the need to protect the environment to the need to protect unnecessary restrictions to trade in goods: "...The measures adopted to safeguard the environment should not exceed the inevitable restrictions justified by an objective for the general good such as the protection of the environment. Under these circumstances it is necessary to determine whether all the restrictions which the legislation in question imposes on the free movement of goods are necessary to attain the objectives of these regulations" ⁽⁸⁵⁾.

(84) Analogously, see SHOENBAUM, *op. ult. cit.*, p. 277.

(85) Decision of September 29, 1988, Case 302/86, in *C.M.L.R.*, p. 619 ff., points 11 and 12.

ANTONIO PARENTI (*)

LOOKING FORWARD: THE EUROPEAN UNION'S QUEST FOR THE MILLENNIUM ROUND

SUMMARY: 1. Introduction. — 2 Marrakech and the "built-in-agenda". — 3. The Singapore Ministerial and the "new issues". — 4. Why a ne Round. — 5. Geneva 1998: paving the way for the new Round. — 6. Conclusions.

1. *Introduction.*

The second WTO Ministerial Conference held in Geneva on 18-20 May 1998 marked the 50th Anniversary of the international trading system embodied first in the GATT and then in the WTO.

Ministers had plenty to celebrate. It is a shared opinion that those fifty years represented a tremendous achievement in the promotion of free and fair trade around the world by gradually reducing tariff and non-tariff barriers to unprecedented low levels and by creating a system for the diplomatic and legal settlement of trade disputes.

Ministers had also plenty to discuss. An important agenda of negotiations lies ahead and the world economy is changing rapidly. This creates new challenges and opportunities that we need to face and to solve should we want the multilateral trading system to continue to make it possible for our economies and societies to grow and prosper.

It is the European Union's firm belief that the best way to cope with the future agenda and the new challenges outlined above is through a new Round of trade negotiations, the Millennium Round, to start at the turn of the century.

(*) The opinions expressed are solely those of the author and do not commit the Institution he works for.

This paper intends to explain how the EU has reached this conclusion and what the perspectives of this possible new Round are. As very important reasons for the launch of a new Round can already be found in the final conclusions of the Uruguay Round, it is from the Marrakech Conference that this analysis starts.

2. *Marrakech and the "built-in-agenda".*

Marrakech saw in April 1994 the formal end of the Uruguay Round and the birth of the World Trade Organization. The achievements of eight years of trade negotiations were tremendous. Beside the establishment of the WTO and further cuts in industrial tariffs, the then GATT Contracting Parties agreed rules on trade on services and on trade related aspects of intellectual property rights, established a mechanism for the binding settlement of trade disputes, brought agriculture more firmly under GATT disciplines and created a mechanism for the review of national trade policies. In addition to this, an important series of Understanding and Agreements updated and interpreted existing GATT rules.

These important results were further strengthened by the introduction, in Article II.2 of the WTO Agreement, of the concept of a "single undertaking" by which all the multilateral agreements signed in Marrakech are binding on all WTO Members, thus breaking away with the practice of the GATT's codes, which were binding only for those countries that had accepted them ⁽¹⁾.

The Uruguay Round could not, however, conclude in time all the negotiations it was mandated to and left over some "unfinished business". Negotiations on civil aircraft, steel, financial services, maritime transport and basic telecoms had to be resumed and finished at a later stage. It is worth already mentioning that this has proved particularly difficult and not always successful ⁽²⁾. In addi-

(1) Only few plurilateral agreements remain out of the scope of the single undertaking, namely: the agreement on trade in civil aircraft, the agreement on government procurement, the international dairy agreement and the international bovine meat agreement.

(2) Negotiations on aircraft, steel and maritime services failed whereas the other negotiations, albeit at the end positively concluded, required lengthy and

tion, some of the agreements concluded during the Uruguay Round foresee the commitment for the WTO Members to enter into follow-up negotiations within a certain deadline. Others foresee an obligation to carry out a review of the rules and procedures established by the agreement or of their implementation ⁽³⁾. Together these three sets of negotiations constitute the so-called "built-in-agenda".

It should be stressed that this "built-in-agenda" is a heavy and substantial one. To fully understand the importance of the commitment undertaken by WTO Members it is sufficient to mention that among the new negotiations that have to start at the turn of the century are those on services and agriculture.

3. The Singapore Ministerial and the "new issues".

With Marrakech the international trading system made a qualitative step forward into a broader dimension than the one previously known in the GATT, which was mainly limited to tariff negotiations. But this is by no mean enough in a world economy that is changing quickly and is increasingly globalised and intertwined. Issues previously considered to be within national control, like the interaction between trade and environment, have been placed firmly on the international trade agenda.

Soon after Marrakech it became evident for some WTO Members that other national policies could have important effects on

difficult negotiations. Trade Ministers meeting in Singapore for the first Ministerial Conference on 9-13 December 1996 recognized these difficulties. Their final Declaration (WTO Document N. WT/MIN(96)/DEC) stated: "The fulfilment of the objectives agreed at Marrakech for negotiations on the improvement of market access in services — in financial services, movement of natural persons, maritime transport services and basic telecommunications — has proved to be difficult. The results have been below expectations. In three areas, it has been necessary to prolong negotiations beyond the original deadlines".

(3) The agreements that will be reviewed are: Anti-Dumping, Customs Valuation, Dispute Settlement Understanding, Import Licensing, Preshipment Inspection, Rules of Origin, Sanitary and Phyto-Sanitary Measures, Safeguards, Subsidies and Countervailing Measures, Technical Barriers to Trade, Textiles and Clothing, Trade Policy Review Mechanism, Trade-Related Aspects of Intellectual Property Rights and Trade-Related Investment Measures.

trade patterns and that these effects should be considered at the WTO level.

Recognising the need to move forward by starting to examine new subjects that if not properly addressed could hinder economic growth was one of the most important results achieved at the first WTO Ministerial Meeting held in Singapore in December 1996. In particular WTO Members at the Ministerial Meeting decided to:

1. "establish a working group to examine the relationship between trade and investment;
2. establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework;
3. establish a working group to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement; and
4. direct the Council for Trade in Goods to undertake exploratory and analytical work, (...) on the simplification of trade procedures in order to assess the scope for WTO rules in this area ⁽⁴⁾".

In addition, WTO Members restated the importance of continuing the examination of the complementarities between trade and environment carried out by the relevant WTO Committee along the terms of reference decided at the end of the Uruguay Round.

What was not decided at Singapore was whether negotiations would take place on these issues once the different working groups had finished their studies. However such a decision, which requires the explicit consensus of the WTO Members, will have to be taken before the end of the century, when the different Working Group are supposed to present their final report to the General Council.

4. *Why a new Round.*

What was described in the previous paragraphs clearly shows the important and heavy agenda of negotiations and revisions that

(4) WTO Document N. WT/MIN(96)/DEC, pages 6-7.

will soon start and subjects which are likely to figure in future negotiations.

To tackle this agenda, two options are possible: either each of the above-mentioned negotiations will be addressed alone, or the comprehensive approach of a new Round of trade negotiations will have to be followed.

The European Union, as confirmed by the conclusions of the General Affairs Council of 30 March 1998 ⁽⁵⁾, favours the second option and is aiming at a comprehensive new Round of commercial negotiations that should start in the year 2000. These conclusions endorsed a clear strategy that the European Commission had been following in previous years ⁽⁶⁾.

The European Union's support for a new Round stems from the clear advantages that it could deliver compared to a sectoral approach. These advantages are twofold: of a negotiating technique nature and of a political nature.

From the negotiating point of view, a Round eases the completion of negotiations by creating links between the different subjects, which will have to form at the end a single package. In this way, WTO Members could negotiate trade off between the different subjects under negotiation and finally reach a coherent and sustainable result. It is therefore possible to trade advantages among sectors which may have different political and trade implications for the countries concerned; with the consequence that a specific country might feel more comfortable with further liberalization in a specific sector to which it attaches a special value, if it is deemed to obtain advantages in other sectors where it is mostly interested.

This type of linkage is by definition excluded from the sectoral approach, where all the countries involved must find an acceptable solution within very limited boundaries of the specific sector or issue under negotiation.

(5) See *Agence Europe*, 1 April 1998.

(6) The idea of a new Round was for the first time advanced by Sir Leon Brittan, the EU Trade Commissioner, in April 1996. The occasion was a speech before the Geneva Graduate Institute of International Studies, where he called on a further Round to usher in the new millenium: the Millenium Round.

It can be argued that the recent success in negotiating the Information Technology Agreement shows that the sectoral approach can also bring about important results and "dispel the myth that significant trade liberalisation can only occur through comprehensive negotiating Rounds (7)". It should not be forgotten, however, that the recent events clearly show how difficult it is to negotiate sectoral agreements or to complete the "unfinished business" of the Uruguay Round. In fact, besides the negotiations that plainly failed, the conclusion of negotiations on information technology had to be postponed several times while the negotiations on financial services could only be finalised after an interim agreement in 1996.

The main difference however between these negotiations and those foreseen for the turn of the century lies in the fact that where the former involved sectors that are already truly globalised, the latter will involve more traditional sectors of the economy, for example agriculture, where further liberalisation is likely to encounter strong opposition from the public in several participant countries.

The history of the agricultural negotiations in the Uruguay Round is well known (8). It was the most difficult negotiation. Nevertheless, in the end an important agreement was reached, and agriculture became a part of a wider package that was balanced, ambitious in its conclusions and where every Member involved could point out to the benefits it would receive. Singling out agriculture will pre-empt precisely this possibility and likely increase the chances of a more limited outcome.

Agricultural negotiations are an issue traditionally considered as problematic for the European Union, which has for long time regarded agriculture not simply as a commercial activity but as one with a high social value attached. But if agriculture is a sensitive

(7) Address of Ambassador Charlene Barshefsky at "The Global Trading System, A GATT 50th Anniversary Forum". The Brookings Institution, March 4, 1998.

(8) For a complete account of the Uruguay Round negotiations see: Hugo Paemen and Alexandra Bensch "From the GATT to the WTO: The European Community in the Uruguay Round", Leuven University Press 1995.

issue for the European Union, and not only for the European Union, other countries, big and small, have different trade concerns that may be clearly exposed should we simply remain attached to the current agenda of negotiations. We therefore risk not only to face the same kind of problems faced in recent years with the "unfinished business", but to amplify them due to the attention that the next negotiations will attract and to the current economic outlook characterised by high unemployment in Europe and fears of the potential impact of the Asian crisis on the US and on other emerging markets.

This leads to the second advantage of a new Round over the sectoral negotiation approach: the political advantage. By the very fact that trade-offs among linked sectors are possible, the end result of a Round is likely to be far more significant than the sum of several sectoral negotiations, thus creating another important push for trade liberalization. In addition by entering into a new Round, WTO Members will clearly demonstrate that they are committed to further trade liberalization. Launching a new Round of trade negotiations will therefore pass the right message at a crucial time and open the doors to the new millenium.

For this very reason it should have an ambitious agenda. In particular, in addition to the issues included in the built-in agenda and to the subjects identified at Singapore it should be open to other issues deemed important by WTO Members, like electronic commerce whose importance is constantly rising.

An area that should surely be included is that of tariff negotiations where it could be possible to work for a very ambitious target: the elimination of tariffs for a very wide range of goods, if not for all of them. A certain period of implementation for such a commitment would be, of course, needed. However, when we consider that tariffs in developed countries are already at levels where the cost of collecting them almost exceeds the revenue they produce and that vast free trade areas already exist or their creation is underway, we see that the goal of total elimination of industrial tariffs could become a realistic possibility and the best counterpart to a process of purely regional-based integration.

5. *Geneva 1998: paving the way for the new Round.*

The Second Session of the WTO Ministerial Conference was held in Geneva on 18-20 May 1998. It marked the celebrations of the fifty years of the multilateral trading system. Beside the rightful celebration of the result achieved, most of the time was spent discussing possible future directions for further negotiations. The results of these discussions are included in the Ministerial Declaration adopted on 20 May 1998 ⁽⁹⁾.

The Geneva Ministerial represented an important step in the direction of the new Round sought by the European Union. It did not decide on the launch of the new Round itself, as such a decision would have been premature given the need to make the necessary preparations for a new Round and given the fact that not all WTO Members are fully convinced yet to start such a Round. However Ministers took the important decision to mandate the General Council "to submit recommendations regarding the WTO's work programme, including further liberalization sufficiently broad-based to respond to the range of interests and concerns of all WTO Members, within the WTO framework, that will enable us to take decisions at the Third Session of the Ministerial Conference".

It is therefore at the Third Ministerial Conference, to be held towards the end of next year in the United States, that a decision on whether to launch a new Round will be taken. In the meanwhile the General Council will meet in special sessions starting in September 1998 to assure the timely preparation of its recommendations ⁽¹⁰⁾.

(9) WTO Document N. WT/MIN(98)/DEC/1.

(10) These should cover, according to the Ministerial Declaration: (i) the issues, including those brought forward by Members, relating to implementation of existing agreements and decisions; (ii) the negotiations already mandated in Marrakech, to ensure that such negotiations begin on schedule; (iii) future work already provided for under other existing agreements and decisions taken at Marrakech; (iv) recommendations concerning other possible future work on the basis of the work programme initiated at Singapore; (v) recommendations on the follow-up to the High-Level Meeting on Least-Developed Countries and (vi) recommendations arising from consideration of other matters proposed and agreed by Members concerning their multilateral trade relations.

Part of the decision on whether to launch a new Round will concern its possible duration. Some of the worries expressed by WTO Members is that by taking this commitment they will embark on another lengthy Uruguay Round style of negotiations.

These are legitimate concerns. Even though the final result of the Uruguay Round was well worth waiting for, it would be difficult for public opinion in the various countries to understand and wait for another eight years of negotiations. However, this need not be the case in the new Round for various reasons. First, WTO Members will not have to face the task of negotiating the establishment of the organization itself. Second, whereas the Uruguay Round dealt with numerous new subjects like Trips and services, these are by now well known by the WTO Members. Third, the number of subjects that could form part of the Round is substantially fewer than those negotiated during the Uruguay Round and Members should be able to deal with them in a period not exceeding three years. Finally WTO Members could agree to the interim implementation of results without awaiting the end of the Round where an agreement has been finalised and provided that the overall balance of interests could be maintained.

6. Conclusions.

After Geneva the European Union's quest for the Millenium Round continues. The year and a half that separate us from the next WTO Ministerial Session will be extremely important for the preparation of the decision and of the eventual Round itself. A decision that will require the unanimous consensus of the WTO Members, some of which are still reluctant to take this commitment.

Those countries should consider that a new Round at the beginning of the new Millenium capable of further reducing trade barriers among countries and thus of enhancing the benefits of globalisation for everybody is a powerful image. And an important image to look at as the world is witnessing the following of the Asian crisis by the Russian one, and signs of financial unrest in Latin America. It will be an insurance policy for the next genera-

tion, showing that the world has learnt from its past mistakes and that it will not return to protectionism in the face of economic crisis.

The Millenium Round is not just a fine name; it is an opportunity that must not be missed.

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Prepared by Hugo Van Hamel
Peace Palace Library
The Hague
1998

(*) This bibliography has been compiled exclusively from materials available in the Peace Palace Library. Originally published in 1997 for the use of the researchers of the Centre for Studies and Research in International Law and International Relations of the Hague Academy of International Law, its bibliographic content has been extended and updated until mid July 1998.

TABLE OF CONTENTS

INTRODUCTORY NOTE, 859. — ABBREVIATIONS, 863. — INTERNATIONAL ECONOMIC LAW, 867. — WORLD TRADE ORGANIZATION, 869. — NATIONAL AND REGIONAL ISSUES, 873. GATT 1947, 877. - GATT 1994, 877. — NATIONAL AND REGIONAL ISSUES, 898. AGRICULTURE, 928. — SANITARY AND PHYTOSANITARY MEASURES, 932. — TEXTILES AND CLOTHING, 934. — TECHNICAL BARRIERS TO TRADE, 936. — INVESTMENT, 939. — DUMPING, 943. — CUSTOMS VALUATION, 952. — PRE-SHIPMENT INSPECTION, 953. — RULES OF ORIGIN, 954. — IMPORT LICENSING, 955. — SUBSIDIES AND COUNTERVAILING MEASURES, 956. — SAFEGUARDS, 962. — SERVICES, 964. — GATS, 972. — NATIONAL AND REGIONAL ISSUES, 978. — INTELLECTUAL PROPERTY, 982. — TRIPS AGREEMENT, 989. — NATIONAL AND REGIONAL ISSUES, 996. — DISPUTE RESOLUTION, 1003. WTO DISPUTE SETTLEMENT, 1009. — TRADE POLICY REVIEW, 1024. — PLURILATERAL TRADE AGREEMENTS, 1029. — TRADE IN CIVIL AIRCRAFT, 1029. — GOVERNMENT PROCUREMENT, 1029. — DAIRY PRODUCTS, 1033. — BOVINE MEAT, 1034. — TRADE AND COMPETITION POLICY, 1034. — TRADE AND SOCIAL STANDARDS, 1040. — TRADE AND THE ENVIRONMENT, 1043. — MISCELLANEA, 1060.

ABBREVIATIONS

AFDI	Annuaire Français de Droit International
AJIL	American Journal of International Law
Am. U. Int'l L.Rev.	American University International Law Review
Am. U.J. Int'l L. & Pol'y	The American University Journal of International Law and Policy
Ann. Air & Space L.	Annals of Air and Space Law
ASIL Proc.	American Society of International Law. Proceedings
B.C. Int'l & Comp. L. Rev.	Boston College International and Comparative Law Review
B.U. Int'l L.J.	Boston University International Law Journal
BGBI.	Bundesgesetzblatt (Bonn)
BOE	Boletín Oficial del Estado (España)
Brooklyn J. Int'l L.	Brooklyn Journal of International Law
Cal. W. Int'l L.J.	California Western International Law Journal
Case W. Res. J. Int'l L.	Case Western Reserve Journal of International Law
CML Rev.	Common Market Law Review
Colo. J. Int'l Env'tl. L. & Pol'y	Colorado Journal of International Environmental Law and Policy
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Cornell Int'l L.J.	Cornell International Law Journal
D.C.L. J. Int'l L. & Prac.	Journal of International Law and Practice
D.P.C.I.	Droit et Pratique du Commerce International
Den. J. Int'l L. & Pol'y	Denver Journal of International Law and Policy
Dir. Comm. Int.	Diritto del Commercio Internazionale
Duke J. Comp. & Int'l L.	Duke Journal of Comparative & International Law
EA	Europa-Archiv
EELR	European Environmental Law Review
EIPR	European Intellectual Property Review
EJIL	European Journal of International Law
EPL	Environmental Policy and Law
EuZw	Europäische Zeitschrift für Wirtschaftsrecht
Fordham Int'l L.J.	Fordham International Law Journal
Ga. J. Int'l & Comp. L.	Georgia Journal of International and Comparative Law

Geo. Int'l Envtl. L.R.	Georgetown International Environmental Law Review
Geo. L.J.	Georgetown Law Journal
Geo. Mason L. Rev.	George Mason Law Review
Geo. Wash. J. Int'l L. & Econ.	George Washington Journal of International Law and Economics
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht. Internationaler Teil.
GYIL	German Yearbook of International Law
Harv. Int'l L.J.	Harvard International Law Journal
Hastings Int'l & Comp. L. Rev.	Hastings International and Comparative Law Review
HELJ	Harvard Environmental Law Review
Hous. J. Int'l L.	Houston Journal of International Law
IBLJ	International Business Law Journal
ICLQ	International and Comparative Law Quarterly
ILM	International Legal Materials
ILSA J. Int'l & Comp. L.	ILSA Journal of International & Comparative Law
Int'l Law.	International Lawyer
J. Int. Arb.	Journal of International Arbitration
J. Transnat'l L. & Pol'y	Journal of Transnational Law & Policy
JOCE	Journal Officiel des Communautés Européennes
JTDE	Journal des Tribunaux. Droit Européen
J.W.T.	Journal of World Trade
J.W.T.L.	Journal of World Trade Law
Law & Pol'y Int'l Bus.	Law and Policy in International Business
LiechtLGBI	Liechtensteinisches Landesgesetzblatt
LIEI	Legal Issues of European Integration
LJIL	Leiden Journal of International Law
Loy. L.A. Int'l & Comp. L.J.	Loyola of Los Angeles International and Comparative Law Journal
Md. J. Int'l L. & Trade	Maryland Journal of International Law and Trade
Mich. J. Int'l L.	Michigan Journal of International Law
Mich. L. Rev.	Michigan Law Review
N.C.J. Int'l L. & Com. Reg.	North Carolina Journal of International Law and Commercial Regulation
NILR	Netherlands International Law Review
N.Y.U.J. Int'l L. & Pol.	New York University Journal of International Law & Politics
Nw. J. Int'l L. & Bus.	Northwestern Journal of International Law & Business
Pace Int'l L. Rev.	Pace International Law Review
Pol. Etr.	Politique Etrangère
RBDI	Revue Belge de Droit International
RDAI	Revue de Droit des Affaires Internationales
RECIEL	Review of European Community & International Environmental Law

RGDIP	Revue Générale de Droit International Public
RIDA	Revue Internationale du Droit d'Auteur
RIW	Recht der Internationalen Wirtschaft
R.M.C.	Revue du Marché Commun et de l'Union Européenne
RTD com.	Revue Trimestrielle de Droit Commercial et de Droit Economique
RTDE	Revue Trimestrielle de Droit Européen
SEW	Sociaal Economische Wetgeving
SJICL	Singapore Journal of International & Comparative Law
SZIER	Schweizerische Zeitschrift für Internationales und Europäisches Recht
Tex. Int'l L.J.	Texas International Law Journal
TLCP	Transnational Law & Contemporary Problems
Trb.	Tractatenblad van het Koninkrijk der Nederlanden
U. Pa. J. Int'l Econ. L.	University of Pennsylvania Journal of International Economic Law
UCLA L. Rev.	UCLA Law Review
Va. J. Int'l L.	Virginia Journal of International Law
Vand. J. Transnat'l L.	Vanderbilt Journal of International Law
W. Comp.	World Competition
W.T.A.M.	World Trade and Arbitration Materials
W.T.M.	World Trade Materials
Wash. & Lee L. Rev.	Washington and Lee Law Review
WuW	Wirtschaft und Wettbewerb
Yb Int'l Env. L.	Yearbook of International Environmental Law
ZaöRV	Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht
ZUM	Zeitschrift für Urheber und Medienrecht
ZVglRWiss	Zeitschrift für Vergleichende Rechtswissenschaft

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GATT 1947 - GATT 1994

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WTO DISPUTE SETTLEMENT

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ISBN 88-14-07399-6



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